Supreme Court, U.S.
FILED
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No. 00 822

In The

# Supreme Court of the United States

BARBARA M. KREMEN,

*Petitioner,*

v.

STATE OF MAINE,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Judicial Court Of Maine**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether an officer may, during the course of a seizure for a traffic offense, question the detained motorist about crimes which are unrelated to the traffic stop and which he has no articulable basis to suspect.

2. Whether an officer may, during the course of a seizure for a traffic offense, request the detained motorist to consent to a search of her automobile where the officer has no basis to suspect any wrongdoing beyond the traffic infraction.

## LIST OF PARTIES

Petitioner, Barbara Kremen, was the defendant in the Maine District Court at Newport and appealed her conviction in that court to the Maine Superior Court for Penobscot County and the decision of that court affirming the judgment of the district court to the Supreme Judicial Court of Maine. Respondent, the State of Maine, was the plaintiff in the District Court and appellee in the Superior Court and the Supreme Judicial Court.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Maine entered in this case June 21, 2000.

## OPINIONS BELOW

The order of the Maine District Court at Newport denying the Petitioner's motion to suppress illegally obtained evidence is set forth at A. 35a.[1] The judgment of the District Court assessing a fine for the marijuana possession is set forth at A. 25a-26a. The order of the Penobscot County Superior Court affirming the District Court's denial of the suppression motion is set forth at A. 28a. The decision of the Supreme Judicial Court of Maine is set forth at A. 1a.

## JURISDICTION

The judgment of the District Court was entered on July 22, 1998 and affirmed by the Superior Court on July 22, 1999. The judgment of the Supreme Judicial Court of Maine was entered on June 21, 2000. On September 7, 2000, Justice Souter extended the time within which the Petitioner could file a writ of certiorari with this Court to and including November 18, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

[1] "A." designates the appendix attached to this petition.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution, the limitations of which are extended to the state officials through Section One of the Fourteenth Amendment, prescribes limits on officers seizing motorists for traffic offenses. The Fourth Amendment is set forth in the Appendix at A. 41a. Section One of the Fourteenth Amendment is set forth at A. 41a.

## STATEMENT

### A. The Factual and Procedural Background.

Officer Pierre Boucher testified that he observed Barbara Kremen's car traveling between forty-six and forty-eight miles an hour in a twenty-five mile-per-hour zone. A. 44a. The officer stopped her, approached her car and advised her that he had stopped her for speeding. A. 45a. Officer Boucher asked her to get out of her car and have a seat in his police cruiser. *Id.*

When Ms. Kremen got in the cruiser, Officer Boucher asked her where she was going. She stated that she was coming from New Hampshire. A. 46a. The officer asked her if she had anything illegal, such as weapons or contraband, in her car. *Id.* The officer testified he had no reason to believe the Petitioner was under the influence of alcohol or other intoxicating substance and no reason for believing the Petitioner was in possession of any contraband or other evidence of a crime. A. 52a-53a.

Ms. Kremen said there was nothing illegal in the vehicle. A. 46a. The officer then "simply asked her if she had a problem if [he] searched the compartment area of the

vehicle." *Id.* The officer testified that she consented to this search and the trial court credited the officer's testimony. A. 35a-36a; 46a.

Officer Boucher told Ms. Kremen he was going to exit the cruiser and search the "compartment area" of her vehicle. A. 47a. The officer then approached the passenger seated in the passenger's seat of Ms. Kremen's car. *Id.* He informed the passenger that the driver had consented to a search of the car and asked the passenger if the car contained any illegal weapons or contraband. A. 48a. The passenger told the officer that there might be something in the trunk. *Id.* The passenger took the key, opened the trunk and showed the officer a large hunting knife. *Id.* The officer told the passenger that the knife "was not an issue . . . [and] would not be a problem." *Id.*

The officer then searched the "front compartment area" of the vehicle and discovered a baggie of marijuana in the glove box. A. 48a-49a. The officer then opened the console between the passenger's and driver's seats and discovered a pipe that contained marijuana. A. 49a. A second officer was called to the scene and a more thorough search of the car was conducted, but no further contraband or evidence of a crime was discovered. A. 50a.

The Petitioner filed a motion to suppress the seized contraband in the Maine District Court at Newport. After a hearing on the matter, the District Court issued an order denying the Petitioner's suppression motion. A. 35a. The District Court conducted a trial and found that the Petitioner had violated Me. Rev. Stat. Ann. § 2383 by possessing a useable amount of marijuana. *State v. Kremen*, 754 A.2d 964, 966 (Me. 2000); A. 1a-2a; 25a-26a. The District Court therefore imposed a fine of $229.00. *Kremen*, 754 A.2d at 966 n.2; A. 2a; 25a-26a.

The Petitioner then appealed the denial of the suppression motion to the Maine Superior Court for Penobscot County. The Superior Court affirmed the District Court's denial of the Petitioner's suppression motion. A. 28a. The Petitioner then appealed to the Supreme Judicial Court of Maine.

**B. The Opinion of the Supreme Judicial Court.**

The Supreme Judicial Court found that Officer Boucher's request for consent to search Barbara Kremen's car occurred while she was stopped for a traffic offense. *State v. Kremen*, 754 A.2d 964, 967 (Me. 2000); A. 5a. The Court recognized that a traffic stop, like an investigatory seizure permitted by *Terry v. Ohio*, 392 U.S. 1 (1968), is limited "in scope to the justification for [its] initiation." *Kremen*, 754 A.2d at 967 (citing *United States v. Brignoni-Ponce,* 422 U.S. 873, 881 (1975)). The court nevertheless found that the officer's request for consent -- though unrelated to the purpose of the traffic stop and unsupported by any articulable suspicion that the search would produce evidence of a crime -- was permissible. 754 A.2d at 967-68; A. 5a.

The Supreme Judicial Court relied upon the decision of this Court in *Brignoni-Ponce*, 442 U.S. at 881-82. In *Brignoni-Ponce,* this Court noted that when an automobile is stopped on reasonable suspicion that the car contains illegal aliens, "[t]he officer may question the driver and passenger [regarding potential alien activity], and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." *Kremen*, 754 A.2d 967; A. 5a (citing *Brignoni-Ponce*, 442 U.S. at 881-82). The Supreme Judicial Court of Maine therefore concluded that a request for consent to search may lawfully be made whenever an officer has seized a motorist.

In dissent, Justice Alexander wrote that this case was representative of "a widespread practice of using apparently legitimate traffic stops to extract 'consent' to vehicle searches from individuals who fit profiles of persons whom police believe might possess drugs, but who engage in no conduct to give any legal basis to search the individual or the vehicle." *Kremen*, 754 A.2d at 970; A. 11a. Justice Alexander reasoned that requesting consent without first informing the Petitioner of her right to leave extended the length of the traffic stop without legal justification, rendering the consent to search invalid. 754 A.2d at 972-73; A. 15a-18a.

Justice Alexander stated in his dissenting opinion that the officer's questions about weapons and drugs and request for consent came after the officer ordered the Petitioner to sit in his cruiser and finished the paperwork relating to the citation. 754 A.2d at 971; A. 13a. The transcript of the officer's testimony does not indicate whether the officer wrote and issued the citation before or after he questioned the Petitioner about weapons and drugs and requested she consent to a search. The record indicates only that she was questioned about these matters while she was seated in the officer's cruiser. A. 45a-46a. The majority concluded that the officer's "request to search Kremen's vehicle occurred while she was stopped for the speeding violation" but does not indicate whether the request for consent occurred before or after the citation was issued.[2]

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[2] The majority opinion also states that "Boucher issued a citation for speeding and asked Kremen if there was anything illegal in the vehicle. The officer also asked if she minded if he searched the vehicle." 754 A.2d at 966; A. 2a. The majority's opinion does not indicate whether this questioning was contemporaneous with the citation's issuance or if the questions preceded or followed the issuance of the citation. Indeed, the record does not allow such conclusions to be drawn. *See* A. 45a-46a.

The issue before this Court, then, is whether an officer who seizes a motorist for a traffic offense may engage in questioning unrelated to the traffic stop, whether or not the questioning actually extends the length of the seizure.

## REASONS FOR GRANTING THE WRIT

A conflict has developed in the lower courts on the issue of whether an officer who stops a motorist for an ordinary traffic offense may question the motorist about matters unrelated to the traffic infraction -- and whether the officer may request consent to search the motorist's car -- without a basis for believing the motorist is guilty of any offense beyond the traffic infraction. Judge Ebel of the United States Court of Appeals for the Tenth Circuit has written that this conflict "warrants *en banc* review by this Court or certiorari review by the United States Supreme Court." *United States v. Holt,* 229 F.3d 931, 945-46 (10th Cir. 2000) (Ebel, J., dissenting). The Petitioner accordingly respectfully requests certiorari review by this Court.

Barbara Kremen was stopped for a traffic offense and questioned about whether she had any illegal weapons or drugs in her car. When she indicated that neither were present, the officer asked her to consent to a search of her automobile. The officer had no articulable suspicion to believe weapons or drugs were present in the vehicle and no reason to believe that the search would produce evidence of crime.

The majority of lower courts limits questioning during a traffic stop. Five federal circuits -- the Seventh, Eighth, Ninth, Tenth and Eleventh -- have held that an officer may ask only questions supported by the officer's suspicion. A question about drugs or weapons is acceptable if the officer

has an articulable basis for believing the motorist possesses either. A request for consent to search is permissible if the officer has reasonable suspicion that his search will yield evidence of a crime. This position is consistent with appellate court holdings in six states -- Georgia, Idaho, Indiana, Missouri, New Jersey, New Mexico -- and the District of Columbia.

A substantial minority of lower courts places no limits on questioning during a traffic stop. Four federal circuits -- the Fourth, Fifth, Sixth and Eighth[3] -- have held that an officer may ask a detained motorist any question -- and may request that the motorist consent to a search of her car -- so long as the officer's questioning does not extend the length of the detention. Appellate courts in four states -- California, Maine, Texas and Wisconsin -- have adopted this position.

The lower courts agree that a traffic stop is analogous to a *Terry* stop and therefore is limited in scope to the investigation of crimes the officer has an articulable basis to suspect. The lower courts disagree, however, on whether questioning unrelated to the observed traffic offense expands the scope of the detention. The minority position rests upon the premise that the length of the detention alone defines the scope of an investigatory detention -- so long as police questioning does not extend the length of the detention, it has not expanded the scope of the detention. The majority position holds that police investigations in traffic stops must be limited to those crimes the officer has a basis to reasonably suspect -- questioning on matters unrelated to the traffic stop expands the scope of the investigation and thus the scope of the detention.

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[3] The Eighth Circuit is listed in each category due to an intra-circuit conflict within that circuit. *See United States v. $404,905 in U.S. Currency*, 182 F.3d 643, 648 (8th Cir.), *cert. denied*, 120 S.Ct. 388 (1999) and *United States v. Allegree*, 175 F.3d 648, 650 (8th Cir. 1999), *cert denied sub nom. Alexander v. United States*, 120 S.Ct. 1175 (2000).

Citizens in some jurisdictions are therefore lawfully subject to pointed questioning and requests for consent to search during a traffic stop while citizens in other jurisdictions may not lawfully be subjected to such interrogations. Lower courts are left without guidance from this Court on this important issue and have logically arrived at different conclusions. Officers in jurisdictions yet to consider this issue are uncertain about the limits of their authority and, given the significant split in authority, are left to guess whether they may constitutionally subject detained motorists to a battery of questions unrelated to the traffic offense.

## I. THE CONFLICT IN THE LOWER COURTS.

The lower courts are very evenly divided on whether the Fourth Amendment limits the subject of an officer's questioning during a traffic stop. The decision of the Supreme Judicial Court of Maine, permitting an officer to ask any question of a motorist detained for a traffic offense, is consistent with the holdings of a substantial minority of courts which have considered a challenge to police questioning during a traffic stop. A bare majority finds that when a motorist is detained for a traffic offense, the officer may question the motorist only about the traffic offense that served as the justification for the seizure, or about crimes the officer has an articulable basis to suspect.

### A. The Majority Position: Police Questioning During a Traffic Stop is Limited to Dispelling or Verifying the Officer's Suspicion.

A majority of the lower courts has held that any questioning unrelated to the basis for the traffic stop is forbidden unless the officer develops reasonable suspicion of wrongdoing beyond the traffic infraction. Five of the federal circuits hold that an officer, during a traffic stop, may only dispel the suspicion he can reasonably articulate. *United States v. Holt,* 229 F.3d 931, 940 (10th Cir. 2000); *United States v. Allegree*, 175 F.3d 648, 650 (8th Cir. 1999), *cert. denied*, 120 S.Ct. 388 (1999);[4] *United States v. Pruitt,* 174 F.3d 1215, 1221 (11th Cir. 1999), *cert denied sub nom. Engle v. United States*, 120 S.Ct. 535 (1999) *and cert. denied sub nom. Mayberry v. United States*, 120 S.Ct. 1214 (2000);

[4] The Eighth Circuit is listed as both a federal circuit permitting questioning unrelated to the stop and as one forbidding questioning unrelated to the stop as there is an intra-circuit conflict on this question.

*United States v. Walden*, 146 F.3d 487, 490 (7th Cir. 1998); *United States v. Baron*, 94 F.3d 1312, 1319 (9th Cir. 1996); *United States v. Finke*, 85 F.3d 1275 (7th Cir. 1996); *United States v. Jones*, 44 F.3d 860, 872 (10th Cir. 1995); *United States v. Perez*, 37 F.3d 510, 513 (9th Cir. 1994); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994); *United States v. Barhona*, 990 F.2d 412, 416 (8th Cir. 1993); *United States v. Bautista*, 684 F.2d 1286, 1290 (9th Cir. 1982).

The appellate courts in six states and the District of Columbia similarly find that the Fourth Amendment forbids questioning during a traffic stop unrelated to the stop, unless the officer develops articulable suspicion of other crimes during the stop. *Mitchell v. United States*, 746 A.2d 877, 887-90 (D.C. 2000); *Almond v. State*, 530 S.E.2d 750, 752 (Ga. Ct. App. 2000); *State v. Myers*, 798 P.2d 453, 457 (Idaho Ct. App. 1990); *Lockett v. State*, 720 N.E.2d 762, 771 (Ind. Ct. App. 1999); *State v. McNaughton*, 924 S.W.2d 517, 523 (Mo. Ct. App. 1996); *State v. Chapman*, 753 A.2d 1179, 1185 (N.J. Super. Ct. App. Div. 2000); *State v. Taylor*, 973 P.2d 246, 252 (N.M. Ct. App. 1998).

The majority position is exemplified by the very recent case of *United States v. Holt*, 229 F.3d 931(10th Cir. 2000). In *Holt*, the defendant was stopped at a license checkpoint and, as the defendant was not wearing a seat belt, he was asked to join an officer in his patrol car. *Id.* at 933. As Officer Tucker was writing the defendant a citation for the seat-belt violation, he asked the defendant if "there was anything in [Holt's] vehicle [Tucker] should know about such as loaded weapons." *Id.* Holt indicated that there was a loaded pistol behind the passenger seat, but did not indicate whether he had a permit for the weapon. *Id.* The officer then asked if "there was anything else [the officer] ought to know about." *Id.* Holt stated that he knew that the officer was referring to drugs but that he "hadn't been involved with them in about a year or so." *Id.* The officer then asked Holt

to consent to a search of his truck and Holt agreed. *Id.* at 933-34.

The Tenth Circuit concluded that

> [Officer] Tucker exceeded the reasonable scope of the detention by questioning Holt about the possession of contraband, including loaded weapons. Although the questioning occurred while Tucker was writing out the citation, it is essentially uncontroverted that the questioning was unrelated to the purpose of the stop (i.e., the seatbelt violation).

*Id.* at 940.[5]

As the Eleventh Circuit stated the position adopted by the majority of federal circuits, when an officer stops a motorist for speeding, questioning should be solely "directed to securing [the driver's] license, registration and insurance papers." *Pruitt*, 174 F.3d at 1221. "In such circumstances, additional 'fishing expedition' questions such as 'What do you do for a living?' and 'How much did your van cost?' are simply irrelevant and constitute a violation of *Terry*." *Id.*

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[5] In dissent, Judge Ebel argued that the state's interest in officer safety justifies asking the detained motorist about the presence of weapons absent any suspicion that weapons are present. *Id.* at 941. Judge Ebel adopts neither the majority nor minority position completely. As "a question about the carrying of weapons while an officer is waiting for dispatch to check the driver's license would not extend the duration of the stop" and the state has an interest in protecting the officer, the question is permissible. *Id.* at 941 n.2. Judge Ebel, however, "would not authorize the officer to extend the duration of the traffic stop nor probe into matters that were not directly related to officer safety." *Id.*

**B. The Minority Position: Police Questioning of a Detained Motorist Runs Afoul of the Fourth Amendment Only if the Questioning Extends the Length of the Detention.**

A substantial minority of lower courts has held that police questioning during a traffic stop may cover any topic of the officer's selection -- so long as the length of the stop is not prolonged by the officer's questioning on matters unrelated to the stop. Four federal circuits find that the subject of an officer's questioning during a traffic stop is not limited to dispelling his suspicion of wrongdoing -- that the scope of the officer's inquiry is unlimited. *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 648 (8th Cir. 1999), *cert. denied sub nom. Alexander v. United States*, 120 S.Ct. 1175 (2000); *United States v. Jacobs*, 173 F.3d 426, 1999 U.S. LEXIS 2691 (4th Cir. 1999); *United States v. Palomino*, 100 F.3d 446, 450 (6th Cir. 1996); *United States v. Davis*, 61 F.3d 291, 300 (5th Cir. 1995); *United States v. Crain*, 33 F.3d 480, 485 (5th Cir. 1994); *State v. Grillo*, 40 F.3d 1245, 1994 U.S. App. LEXIS 30721 (4th Cir. 1994); *United States v. Shabazz*, 993 F.2d 431, 436-437 (5th Cir. 1993).

Four state courts similarly find that officers may pose any question to a motorist seized during a traffic stop, including a request to consent to a search for drugs or weapons, even absent any basis for believing drugs or weapons will be discovered. *People v. Brown*, 72 Cal. Rptr.2d 793, 796 (Cal. Ct. App. 1998); *State v. Powell*, 5 S.W.3d 369, 376 (Tex. Ct. App. 1999), *cert. denied*, 120 S.Ct. 1976 (2000); *State v. Gaulrapp*, 558 N.W.2d 696, 700 (Wisc. Ct. App. 1996).

The minority position is exemplified by *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993). "[W]e reject any notion that a police officer's questioning [during a traffic stop], even on a subject unrelated to the purpose of the stop itself, is itself a Fourth Amendment violation." *Id.* at 436.

The minority position recognizes that under *Terry v. Ohio*, 392 U.S. 1 (1968), "the scope of a search [or seizure] must be reasonably related to its initial justification." *Shabazz*, 993 F.2d at 436 (citing *Terry*, 392 U.S. at 19). The minority position simply holds that police questioning implicates the Fourth Amendment only where the questioning extends the length of the seizure.

> This is not to say that questioning is unrelated to the determination that a detention has exceeded its lawful duration. In a garden variety *Terry* stop, the nature of the questioning during a later portion of the detention may indicate that the justification for the original detention no longer supports its continuation. Thus, when a police officer reasonably suspects only that someone is carrying a gun and stops and frisks that person, the officer, after finding nothing in a pat down, may not thereafter further detain the person merely to question him about a fraud offense. . . . When the officer is satisfied that the individual is not carrying a gun, the officer may not detain him longer to investigate a charge lacking reasonable suspicion. At that point, continuation of the detention is no longer supported by the facts that justified its initiation. Thus, detention, not questioning, is the evil at which *Terry* . . . is aimed.

*Shabazz*, 993 F.2d at 436.

The minority position permits a broad range of highly intrusive questioning to occur so long as the traffic stop has not concluded. As one panel of the Eighth Circuit has held, during a traffic stop, while a computer records check is being conducted, or while the officer is writing a citation, the officer "may ask the motorist routine questions such as his destination, the purpose of the trip, or *whether the officer may search the vehicle*, and he may act on whatever information is volunteered." *$404,905.00 in U.S. Currency*, 182 F.3d at 647 (emphasis added).

## II. THIS COURT'S DOCTRINES DO NOT RESOLVE WHETHER CONSTITUTIONAL LIMITS ARE PLACED ON POLICE QUESTIONING DURING AN INVESTIGATORY DETENTION OR TRAFFIC STOP.

This Court has held that a traffic stop is analogous to a *Terry* stop. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). The lower courts considering the limits of police questioning during a traffic stop nearly universally assume that the scope of the detention during a traffic stop is limited by this Court's doctrines on *Terry* stops.[6] Fifteen years ago, Professor Dix observed that this Court had yet to address whether there were limits on an officer's power to question citizens subjected to investigative detentions. George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure*

[6] One panel of the Eighth Circuit has held that as a traffic stop is predicated on probable cause, the scope of the investigation is not limited as it is in a seizure based merely on reasonable suspicion. *$404,905.00 in U.S. Currency*, 182 F.3d at 647-48. This reasoning was sharply criticized by the Tenth Circuit. *United States v. Holt*, 229 F.3d 931, 935 n.2 (10th Cir. 2000).

*Law*, 1985 Duke L. J. 849, 937-38. The Court has yet to address this issue in the intervening time, leaving unanswered not only the limits of an officer's power to question during a *Terry* seizure, but also the limits of an officer's power to question during the analogous traffic stop.

Traffic stops are very common and an opportunity often exists for an officer to question a motorist about matters unrelated to the traffic offense without expanding the length of the detention. The officer's questions may come as he is writing a traffic citation or as he awaits the results of a computer check of the driver's license. This Court's doctrines on *Terry* seizures, police questioning and consensual searches do not define the limits, if any, of the officer's authority in this commonplace situation. This uncertainty has allowed the substantial split in authority in the lower courts.

### A. *Terry v. Ohio* and its Progeny Limit the Scope of a Seizure to Confirming or Dispelling an Officer's Suspicion.

*Terry v. Ohio*, 392 U.S. 1, 20 (1968) requires that an investigative detention be "justified at its inception" and be "reasonably related in scope to the circumstances which justify the interference in the first place." The right of an officer to engage in questioning unrelated to a traffic offense for which he stopped the motorist turns on the definition of the word "scope" -- a term imprecisely defined in *Terry*'s progeny. If the scope of the detention refers to the officer's investigation during the seizure, then questioning unrelated to the traffic stop seems forbidden by *Terry*. If the scope of the detention refers to the length of time required to confirm or dispel the officer's suspicion, then *Terry* seems to place no restrictions on an officer's questioning, so long as his questioning does not expand the length of the seizure.

*Terry*'s progeny simply leaves unanswered the precise meaning of the "scope of the detention."

*Adams v. Williams,* 407 U.S. 143, 146 (1972) permits a "brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information." Indeed, an officer who has seized a motorist and is awaiting a computer check of the driver's license or registration is maintaining the status quo while obtaining more information. This Court's doctrines simply leave open the question of whether he may ask the motorist to provide information unrelated to the traffic infraction while he maintains the status quo. As the Court has never heard a case in which unrelated questioning during a seizure could occur without extending the length of the stop, this Court has not yet needed to clarify this ambiguity. This case, and the conflict the ambiguity has caused in the lower courts, now requires that clarification.

In *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975), this Court explained that "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion." While the seized motorists could be asked to "explain suspicious circumstances," however, "any further *detention* or search must be based on consent or probable cause." *Id.* at 881-82. (emphasis added). Again, the Court left the ambiguity that now manifests itself in the confusion in the lower courts. The Court did not clarify whether an investigation unrelated to the basis for the seizure was forbidden or merely an unrelated investigation that extended the length of the traffic stop.

The plurality opinion in *Florida v. Royer*, 460 U.S. 491 (1983) further analyzed the justification of a *Terry* seizure.

> [A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. . . . It is the state's burden to demonstrate that the seizure it seeks to justify on the basis of reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.

*Id.* at 500 (citations omitted).

The plurality's statement that the *seizure* must be limited in "scope and duration" indicates that at the least "scope" is something other than simply duration and perhaps any investigation unrelated to the stop exceeds the permissible bounds of the seizure. The meaning of this statement, however, has not been explored by this Court. The Court has yet to have occasion to consider the limits of a police investigation during a traffic stop or other situation where unrelated questioning could occur without expanding the length of the detention.

In 1984, this Court announced that a traffic stop was analogous to a *Terry* seizure. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). The Court held that *Miranda* warnings were not required when an officer questioned a motorist during a traffic stop as the atmosphere during a traffic stop was less intrusive than that suffered by one under custodial

arrest.[7] *Id.* at 438-39. Questioning during a traffic stop further resembles questioning during a *Terry* seizure, this Court held.

> Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must be released.

*Id.* at 439-40.

In *McCarty*, the Court addressed questions about intoxication of a driver reasonably suspected of driving under the influence. *Id.* at 433. The scope of questioning was therefore not at issue and the Court addressed only the issue of whether questions related to the traffic seizure required *Miranda* warnings.

In cases where this Court has addressed the permissible scope of a *Terry* seizure, there was no need to discuss whether *Terry* prohibits merely continued detention for questions unrelated to the stop or forbids any questioning unrelated to the basis for the seizure. The instant case provides a commonplace example of the need to clarify the ambiguity.

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[7] *See Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring police to inform suspect in custody of his right to remain silent during police questioning).

### B. This Court's Doctrines on Police Questioning Citizens who are at Liberty Provide No Guidance on this Issue.

Courts finding that police officers may engage in unrestricted questioning of detained motorists rely upon the holdings of this Court that police questioning of a person free to ignore the officer and walk away does not violate the Fourth Amendment. *See United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993); *State v. Gaulrapp*, 558 N.W.2d 696, 700 (Wisc. Ct. App. 1996). This Court's doctrines on police questioning of a person at liberty do not address whether the constitution places limits on an officer's power to question a citizen he has seized.

This Court has held that "mere police questioning does not constitute a seizure." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Therefore, a person at liberty to ignore the officer and walk or drive away may be subjected to unrestricted questioning by police officers.

> Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if he is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

*Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion).

So long as officers do not impose a restriction on a person's power to walk or drive away from the officer then there is no limitation on police questioning. *Bostick*, 501

U.S. at 436-37; *INS v. Delgado*, 466 U.S. 210 (1984). It is not relevant that the person is actually unable to walk or drive away from the officer, so long as the officer is not imposing the restraint that prevents the person from leaving. *Bostick*, 501 U.S. at 436-37; *Delgado*, 466 U.S. at 218. This Court has not answered the question of whether a person, seized by an officer for one purpose, may be questioned about any matter of the officer's choosing.

In *Bostick*, this Court held that police officers who boarded a bus could question passengers about crimes the officers had no articulable basis to suspect. 501 U.S. at 437. The defendant argued that he did not feel free to leave the encounter with the police, thus their questions to him, unsupported by reasonable suspicion, were impermissible. *Id.* at 435. The defendant felt he was not free to depart from the officers because the officers questioned him on a bus that was about to depart -- had he disembarked from the bus, he would have risked being stranded and separated from his luggage. *Id.*

This Court held that the constraints on Bostick's freedom of movement came, not by way of an official seizure, but as a result of Bostick's choice to take a bus. "Bostick's movements were 'confined' in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive." *Id.* at 436. Police questioning was not restricted in this situation because the officers did not create the circumstance that limited Bostick's option to depart. "Bostick's freedom of movement was restricted by a factor independent of police conduct -- i.e., by his being a passenger on a bus." *Id.*

In *Delgado*, this Court permitted questioning of factory workers about their citizenship and right to work. 466 U.S. at 220-21. While the workers were not free to disregard the

questions by immigration officials and walk away, the constraint was not imposed by the officials questioning them. "[W]hen people are at work, their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the worker's voluntary obligations to their employers." *Id.* at 218. Accordingly, no seizure had occurred and nothing about the actions of immigration officials imposed further restrictions on those questioned.

In the instant case, Barbara Kremen was detained by Officer Boucher when she was asked about matters unrelated to the officer's reason for seizing her. The restraint on her liberty was created entirely by the officer who questioned her about crimes he had no articulable basis to suspect. In *Delgado*, this Court recognized that it had previously not ruled on "whether mere questioning by a police officer, without more, can amount to a seizure under the Fourth Amendment." 466 U.S. at 216. Since *Delgado*, this Court has yet to rule on whether once the officer has a person seized for the purpose of investigating one matter, he may, during the seizure, engage in questioning unrelated to the basis for the seizure.

### C. The Court has Addressed the Factors Determining When Consent is Valid, Not Circumstances Under Which Consent May Be Requested.

This Court has examined the factors to be analyzed in determining whether a citizen has voluntarily consented to a search. *Ohio v. Robinette*, 519 U.S. 33 (1996); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The Court has not, however, addressed whether such a request may be posed

during an investigative detention for a suspected crime which would leave behind no physical evidence.

Barbara Kremen was stopped for speeding. When the officer seized her and examined her license and registration, he had obtained all the information necessary to prosecute the speeding offense. *See Knowles v. Iowa*, 525 U.S. 113, 118 (1998) (prohibiting search incident to citation for speeding offense as no more evidence of traffic offense could be discovered in search incident to citation). A search of her car would reveal no more evidence of speeding, which was the basis of the seizure and the only crime the officer had a basis to suspect at the time he requested her consent to a search. This Court has not addressed whether the officer may request consent to search under these circumstances.

Twice this Court has addressed the validity of a motorist's consent to an officer's request to search his vehicle. *Robinette*, 519 U.S. at 35; *Bustamonte*, 412 U.S. at 223. In each case, the Court addressed only the question of whether an officer must provide a cautionary warning to a motorist before consent may be voluntarily given. In neither case did the Petitioner assert that the officer was not constitutionally permitted to request consent to search.

In *Bustamonte*, this Court granted certiorari to resolve a conflict in lower federal and state courts on the question of "what must the prosecution prove to demonstrate that a consent was 'voluntarily' given." 412 U.S. at 223. Specifically, this Court in *Bustamonte* granted certiorari to determine whether "it is an essential part of the State's burden to prove that a person knows he has a right to refuse consent." *Id.* Reconciling a tension between the lower courts, this Court held that knowledge of the right to refuse consent is one factor to be taken into account in determining whether consent is voluntary; "the government need not

establish such knowledge as a *sine qua non* of an effective consent." *Id.* at 227.

In *Bustamonte*, this Court recognized that it was striking a balance between the need for effective law enforcement and a recognition that unchecked questioning may offend "civilized notions of justice." *Id.* at 225.

> At one end of the spectrum is the need for police questioning as a tool for effective enforcement of criminal laws. . . . At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used an instrument of unfairness, and that the possibility of unfair and even brutal police tactics pose a real and serious threat to civilized notions of justice.

*Id.*

Absent a basis for suspecting a search will produce evidence of a crime, the state has no legitimate interest in subjecting an ordinary traffic offender to a search of her car. *Knowles*, 525 U.S. at 118. *Bustamonte*, however, did not address whether the absence of any interest in criminal enforcement in a particular case would prohibit an officer from making the request of a motorist who was not free to ignore the officer and depart. As the Court recognized, the decision in *Bustamonte* was "a narrow one," that merely rejected a rule that required the prosecution to always demonstrate that a citizen who consented to a search had been warned of his right to refuse. 412 U.S. at 248-49.

In *Ohio v. Robinette*, 519 U.S. 33, 35 (1996), the Court granted certiorari to resolve the question of whether a motorist must be informed that he is "free to leave" before

his consent to search is voluntary. The officer in *Robinette* stopped a motorist for a traffic offense, issued a verbal warning and returned the driver's license to him. *Id.* Without telling the motorist he was free to leave, the officer requested that the motorist consent to a search of his car, which he did. *Id.* at 35-36.

The Court held, consistent with *Bustamonte*, that there was no "per se rule" or "litmus-paper test" to determine the validity of consent. *Id.* at 39. Consent must be "determined from all the circumstances" and the fact that an officer has not informed a motorist that he is "free to leave" is but one factor to consider in determining whether the consent is valid. *Id.* at 40. The Court did not address whether the request could be made before the motorist was actually free to leave, or would have reasonably felt free to leave. Again, this Court issued a narrow ruling consistent with *Bustamonte*, that no particular set of warnings stand as a prerequisite to valid consent.

The Court then remanded the matter to the Ohio Supreme Court which found, as a matter of fact, the defendant was not free to leave when the officer requested consent to search. *State v. Robinette*, 685 N.E.2d 762, 770-71 (Ohio 1997). The Ohio Supreme Court found that the Ohio Constitution's protection against unreasonable searches and seizures was co-extensive with the protection afforded by the Fourth Amendment to the United States Constitution. *Id.* at 771. Citing *Schneckloth v. Bustamonte*, the Court held under the facts of *Robinette*, the motorist must actually be free to leave before his consent is voluntary. *Id.* (citing *Schneckloth v. Bustamonte*, 416 U.S. 218 (1973)).

The Ohio Supreme Court interpreted this Court's precedents to, at least in some circumstances, require that a defendant actually be free to leave before consent may lawfully be obtained from him. The Ohio Supreme Court

held that this Court's precedents do not always permit an officer to request consent of a person over whom he has custody. The split in authority in the lower courts on an officer's power to question a seized motorist on issues unrelated to her seizure demonstrates, however, that the accuracy and application of the Ohio court's interpretation of this Court's doctrines is the subject of considerable debate. The substantial disagreement in the lower courts on an officer's power to request consent of any motorist seized for a traffic offense is a reflection of the ambiguity in this Court's authority on this question and, as Judge Ebel suggested, calls for this Court's review. *See United States v. Holt*, 229 F.3d 931, 945-46 (10th Cir. 2000).

## CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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November 18, 2000

754 A.2d 964 (Me. 2000)

2000 ME 117

**STATE of Maine**

**v.**

**Barbara M. KREMEN**

Supreme Judicial Court of Maine

Submitted on Briefs Feb. 25, 2000
Decided June 21, 2000

R. Christopher Almy, District Attorney, C. Daniel Wood, Asst. Dist. Atty., Gregory Campbell, Asst. Dist. Atty., Portland, for State.

Stephen J. Schwartz, Schwartz & Schwartz, P.A., Portland, for defendant.

Panel: WATHEN, C.J. and CLIFFORD, RUDMAN, DANA, SAUFLEY, ALEXANDER, and CALKINS, JJ.

CLIFFORD, J.

[¶1] Barbara Kremen appeals from a judgment of the Superior Court (Penobscot County, *Marden, J.*) affirming a judgment entered in the District Court (Newport, *MacMichael, J.*) following a finding that she violated the provisions of 22 M.R.S.A. § 2383 (1992)[1] by possessing a

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1. 22 M.R.S.A. § 2383 provides, in relevant part:

**§ 2383. Possession**

useable amount of marijuana.[2] Kremen contends that the court erred in denying her motion to suppress evidence, and challenges the sufficiency of the evidence at trial. We find no error and affirm the judgment.

[¶2] On August 15, 1997, Kremen, while en route to a Phish concert in Aroostook County, was stopped for speeding in the Town of Newport by Officer Peter Boucher. Boucher issued a citation for speeding and asked Kremen if there was anything illegal in the vehicle. The officer also asked if she minded if he searched the car. Kremen testified that she did not give such permission, but according to the officer, Kremen readily agreed to his request to search her car. The officer discovered a small bag of marijuana in the glove compartment and a pipe containing marijuana in the vehicle's center console. He then cited Kremen for possession of a useable amount of marijuana.

[¶3] Kremen's motion to suppress the marijuana evidence was denied following a hearing.[3] The court (*Hjelm, J.)* found that the initial stop of Kremen's vehicle was proper and that Kremen had voluntarily consented to the subsequent

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**1. Marijuana.** Possession of a usable amount of marijuana is a civil violation for which a forfeiture of not less than $200 nor more than $400 shall be adjudged for the first offense. A forfeiture of $400 shall be adjudged for the 2nd and subsequent offenses within a 6-year period.

**2.** Kremen was assessed a fine of $229.00.

**3.** Kremen was initially defaulted for failure to appear in the District Court. The default was set aside following Kremen's motion for relief from judgment filed pursuant to M. R. Civ. P. 60(b). Kremen then filed a motion to suppress.

search of the vehicle. The court also concluded that the scope of Kremen's consent allowed Boucher to search the glove compartment and console, and that the marijuana that was found provided probable cause to search the rest of the vehicle.

[¶4] By the time of Kremen's bench trial in July of 1998, the marijuana and the pipe could not be found. Boucher testified that although the marijuana that he seized had not been tested, he had been trained in the identification of marijuana, and that the substance he had taken from the glove compartment appeared to be and smelled like marijuana. Kremen was found to have possessed a useable amount of marijuana *(MacMichael, J.)*. This appeal followed Kremen's unsuccessful appeal to the Superior Court.

I.

[¶5] Kremen first contends that the suppression court abused its discretion when it allowed Officer Boucher to testify that he stopped Kremen for speeding based on his observation of his radar equipment. She contends that he was not certified to operate the radar, making the stop of Kremen's car for speeding unjustified. Kremen did not object to Boucher's testimony at the suppression hearing on the ground that his certification to operate radar had expired. Rather she argued to the court that the testimony should be given little weight. Thus the issue of the admissibility of that testimony has not been preserved. Moreover, because the court has to find only that the officer had an articulable suspicion that criminal conduct or a civil violation has occurred, *see State v. Brown*, 1997 ME 90, ¶5, 694 A.2d 453, 455, the expiration of the officer's previously valid certification would likely have little impact on the court's determination of whether that standard had been met.

[¶6] Kremen also contends that the court erred in its finding that she had consented to the search. First, she argues that Boucher could not ask for her consent to search the vehicle unless he had an articulable suspicion that it contained contraband. Second, she contends that the court erred when it found she had given "knowledgeable consent."[4] The State contends that Boucher's request to search the vehicle was proper because it came during the lawful stop for speeding.

[¶7] We review a finding that voluntary consent was given for clear error. *See State v. Seamen's Club*, 1997 ME 70, ¶ 7, 691 A.2d 1248, 1251 (citing *State v. Marden*, 673 A.2d 1304, 1310 (Me.1996); *State v. Cress*, 576 A.2d 1366, 1367 (Me.1990)).

> It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is per se unreasonable...subject only to a few specifically established and well-delineated exceptions. It is equally well settled that one of the specifically established exceptions to the requirements of *both a warrant and probable cause* is a search that is conducted pursuant to consent.

*Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (quotations and citations omitted) (emphasis added). Any consent obtained during an invalid seizure, however, is ineffective. *See Dunaway v. New York*, 442 U.S. 200, 217-18, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) discussing the extent of the Fourth Amendment's exclusionary rule).

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**4.** Kremen also argues, and the State concedes, that the search was proper only if Kremen consented to it.

[¶8] The evidence before the court on the motion to suppress shows that Boucher's request to search Kremen's vehicle occurred while she was stopped for the speeding violation. Consent obtained during this stop is not unlawful under *Dunaway* unless there was no articulable suspicion to stop Kremen for the speeding violation. Here, there was articulable suspicion that Kremen was speeding.

[¶9] Relying on *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), Kremen also argues that Boucher's request for permission to search the vehicle was not " 'reasonably related in scope to the justification for [its] initiation.'" *Id.* at 881, 95 S.Ct. 2574 (quoting *Terry v. Ohio*, 392 U.S. 1, 29, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). The Court in *Brignoni-Ponce*, however, stated that "[t]he officer may question the driver and passengers [regarding the potential illegal activity],[5] and he may ask them to explain suspicious circumstances, *but any further detention or search must be based on consent or probable cause.*" *Brignoni-Ponce*, 422 U.S. at 881-82, 95 S.Ct. 2574 (emphasis added). Thus, although *Brignoni-Ponce* holds that investigatory questions must be limited to the justification for the stop, it does not follow that a simple request for permission to search a vehicle, without more, is a Fourth Amendment violation. Moreover, the Supreme Court explicitly noted that consent allows further investigation beyond the initial justification. *See id.* at 882. It follows, then, that an officer is allowed to *ask* for that consent.

[¶10] We have held that, to be valid, consent must be voluntary and given "by one 'with an appropriate relationship to the property searched.' " *State v. Sherburne*, 571 A.2d

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**5.** The defendants in *Brignoni-Ponce* were suspected of being illegal aliens. *See id.* at 881, 95 S.Ct. 2574.

1181, 1185 (Me.1990) (quoting *State v. McLain*, 367 A.2d 213, 217 (Me.1976)). In addition, a search made pursuant to consent is limited to the bounds of that consent. *See Sherburne*, 571 A.2d at 1185 (citing *State v. Koucoules*, 343 A.2d 860, 867 (Me.1974)).

[¶11] Boucher's testimony at the suppression hearing is sufficient to support findings that his request for permission was made during a valid stop for speeding, and that Kremen voluntarily consented to the search of her vehicle. The District Court, on the motion to suppress, found each of these elements. Accordingly, the court did not err when it denied Kremen's motion to suppress.

II.

[¶12] Kremen contends that there was insufficient evidence to support a finding that she was in possession of the alleged marijuana taken from her vehicle. She also argues that the substance destroyed was potentially exculpatory evidence, and that the evidence was insufficient to support a finding that the substance taken was, in fact, marijuana.

[¶13] In a review of an adjudication of a civil violation, we view the evidence in a light most favorable to the State, to determine whether evidence supports a finding, by a preponderance of the evidence, that the State has established every element of the violation. *See* M.R. Civ. P. 80H(h). "When the Superior Court acts as an intermediate appellate court, we review the decision of the trial court directly." *Emerson*, 675 A.2d at 979 (citing *Noyes v. Noyes*, 617 A.2d 1036, 1037 (Me.1992)).

[¶14] Possession may be either actual or constructive. Here, the State concedes that Kremen was not in actual possession of the marijuana. We have discussed what is

required to prove constructive possession. *See State v. Ketchum*, 1997 ME 93, ¶ 13, 694 A.2d 916, 918-19. "Constructive possession means that although one does not have actual physical control of the goods, he had dominion, authority or control over them," (*State v. DePhilippo*, 628 A.2d 1057, 1060 (Me.1993)) (quoting *State v. Durgan*, 467 A.2d 165, 167 (Me.1983)). We have upheld a finding of constructive possession when stolen goods were found in a vehicle that defendant "both owned and occupied," *see DePhilippo*, 628 A.2d at 1060, when stolen goods were found in a vehicle the defendant used as his home and was driving at the time of the stop, *see State v. Mower*, 407 A.2d 729, 733 (Me.1979), and when stolen goods were found on premises where the defendant resided, *see State v. Robinson*, 561 A.2d 492, 495 (Me.1989).

[¶15] As to the destruction of the marijuana, we have described the consequences of a failure to preserve evidence as follows:

> The State's failure to preserve evidence does not violate a criminal defendant's right to a fair trial unless (1) the evidence possesses an exculpatory value that was apparent before the evidence was destroyed, (2) the defendant would be unable to obtain evidence of comparable value by other reasonably available means, and (3) the State acted in bad faith in failing to preserve potentially useful evidence.

*State v. Cyr*, 588 A.2d 753, 755 n. 4 (1991) (citing *State v. Lewis*, 584 A.2d 622, 625 (Me.1990)). All three elements must be present in order for Kremen's right to a fair trial to be found to have been violated.

[¶16] Here, the testimony supports a finding that Kremen was driving a vehicle in which marijuana was found

both in the glove compartment and in the center console. That Kremen was in constructive possession of marijuana may be inferred under our prior holdings. Also, contrary to Kremen's contentions, it was not "apparent before the evidence was destroyed" that the alleged marijuana possessed exculpatory value, nor does it appear that the evidence was destroyed in bad faith. Accordingly, her right to a fair trial was not violated. Finally, Boucher testified that he had been trained to identify marijuana, and that he had identified the substance as marijuana. The court was entitled to rely on this testimony to find that it was in fact marijuana. Thus, the court did not err when it determined that the elements of the violation had been proven by a preponderance of the evidence.

The entry is:

Judgment affirmed.

CALKINS, J. with whom SAUFLEY, J., joins, concurring.

[¶17] I write separately to indicate that I concur in the portion of the decision concerning the consent to search because our prior decisions hold that we assume that the suppression judge found all facts necessary to the grant or denial of a suppression motion in the absence of a request for findings. *See State v. Izzo*, 623 A.2d 1277, 1280-81 (Me. 1993) (upholding denial of suppression motion and stating that appellant has the burden to request that court expand on findings; in the absence of such a request, we assume the suppression court found all facts necessary to support its ruling); *State v. Powell*, 591 A.2d 1306, 1308 n. 4 (Me.1991) (upholding suppression order and noting that because State failed to request findings, we assume that suppression court found all necessary facts to support grant of motion). Given that Kremen did not request additional findings, pursuant to

M.R.Crim. P. 41A(d), we assume that the court found the historical facts necessary for its denial of the motion.

[¶18] I agree with the dissent that if Kremen was unlawfully detained at the time she was asked for permission to search, her consent would be invalid. I cannot conclude from the facts contained in the court's written findings that Kremen's detention at that time was illegal as a matter of law.[6] *See State v. Rizzo*, 1997 ME 215, ¶ 11, 704 A.2d 339, 342-43 (stating that we review independently legal conclusions based on the historical facts found by the trial court). Likewise, if the court had found facts indicating that Kremen was in custody to a degree associated with arrest, her consent would be invalid if she had not been given *Miranda* warnings and waived the *Miranda* rights, and if the court had found her consent was not voluntarily given, the search results would have to be suppressed.

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6. The court's only findings regarding the detention are as follows:

> After some initial conversation between [the officer] and the Defendant, the officer asked her to accompany him to the police cruiser, and she did so. During the ensuing conversation, the Defendant advised [the officer] that she was driving to a rock concert in Aroostook County. While they were in the cruiser, [the officer] asked her if there was "anything illegal" in the vehicle. The Defendant responded in the negative. [The officer] then asked the Defendant if he could search the "front compartment area" of the vehicle. The Defendant consented to this.

[¶19] The suppression court did not explicitly make findings concerning the legality of the detention once the speeding ticket was given; it did not make findings concerning custody; nor did it find that Kremen's consent was voluntary.[7] Because no further findings were requested by Kremen, and because we have repeatedly held that we assume that the court found all facts necessary to its decision when there is no request for findings. I concur that the trial court did not err in denying the motion to suppress.

ALEXANDER, J., dissenting.

[¶20] I respectfully dissent. This case presents a fact pattern that suggests an involuntary, compelled "consent" search of an individual who had been seized for a traffic stop and from whom a verbal consent to search may have been extracted as the price of her freedom to leave. As such, the circumstances surrounding the individual's seizure and subsequent verbal consent must be subject to careful Fourth and Fifth Amendment analysis and concurrent analysis under Article 1, section 5[8] and 6[9] of the Maine Constitution. The

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7. Although the suppression court did not find voluntariness explicitly, it discussed the voluntariness issue in a footnote in its written decision. Thus, it would be difficult to conclude that the court did not implicitly find voluntariness.

8. Article 1, section 5 states:

> **5. Unreasonable searches prohibited.**
>
> Section 5. The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor

trial court did not make factual findings critical to proper analysis of the issues incident to application of each of these important constitutional rights.

[¶21] This case involves no casual roadside encounter over a minor traffic stop followed by a relaxed consent to search with the unanticipated discovery of marijuana secreted in the vehicle. Instead, the record suggests what has come to be recognized as a widespread practice of using apparently legitimate traffic stops to extract "consent" to vehicle searches from individuals who fit profiles of persons whom police believe might possess drugs, but who engage in no conduct to give any legal basis to search the individual or the vehicle. This practice has been subject to widespread scholarly comment and criticism. *See* Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); Chris K. Visser, *Without A Warrant, Probable Cause or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving a Car?*, 35 HOUS. L. REV. 1683 (1999); Comment, *Pretextual Traffic Stops: Protection Our Streets or Racist Police Tactics?* 23 U. DAYTON L. REV. 313 (1998); David Rudovsky, *The Impact of the War on Drugs on*

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without probable cause -- supported by oath or affirmation.

Me. Const. art. 1 § 5.

**9.** Article 1, section 6 states, in pertinent part: "The accused shall not be compelled to furnish or give evidence against himself or herself, nor be deprived of life, liberty, property or privileges, but by judgment of that person's peers or the law of the land."

Me. Const. art. 1, § 6.

*Procedural Fairness and Racial Equality,* 1994 U. CHI. LEGAL. F. 237.

[¶22] In the principal United States Supreme Court case addressing a consent extracted after a traffic stop, the searching officer had requested consent to search in 786 traffic stops in just the year of the defendant's arrest. *See Ohio v. Robinette*, 519 U.S. 33, 40, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) (Ginsburg, J., concurring). The concurring opinion noted that Ohio courts "observed that traffic stops in the State were regularly giving way to contraband searches, characterized as consensual, even when officers had no reason to suspect illegal activity." *Id.* Similarly, one of the nation's primary authorities on search and seizure has observed that "[i]n an incredible number of drug cases, the encounter with the police commenced with a seemingly innocuous traffic violation." *See* Wayne R. LaFave, *The Present and Future Fourth Amendment*, 1995 U. ILL. L. REV. 111, 118.

[¶23] While this law enforcement practice has been most frequently analyzed in connection with racially motivated traffic stops and compelled consents to search,[10] the legal principles apply equally here where a young woman was on her way to a concert where widespread drug use was anticipated. The facts of this case and the proper approach for the Court in reviewing the motion to suppress must be analyzed from this perspective, as reflective of a common tactic to force and then justify a search without reasonable articulable suspicion, exigent circumstances, or safety concerns that are the usual bases for a warrantless seizure and search.

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**10.** In addition to the cited law review articles and notes, see *Illinois v. Wardlow*, 528 U.S. ---, 120 S.Ct. 673, 682 n.10 (2000) (Stevens, J., dissenting).

## I. THE FACTS OF THE STOP

[¶24] Barbara Kremen was stopped for speeding shortly after noon on August 15, 1997. The stop was only for speeding. The officer saw no erratic operation or other suspicious activity in the vehicle. The record indicates no issue that would have given the officer any reason to require the vehicle's occupants to leave the vehicle due to concerns regarding the officer's safety or the occupant's safety. However, the officer did not engage in the common practice of leaving the driver in the vehicle while he returned to his vehicle to check license status and write a ticket. Instead, he ordered Ms. Kremen to exit her vehicle and accompany him back to the front seat of his vehicle. The officer then finished all of the paperwork incident to the traffic stop and issued the speeding ticket to Ms. Kremen. The transaction regarding the traffic stop was completed. However, the officer did not release Ms. Kremen from his vehicle and tell her she was free to go. Instead, he began questioning her as to whether there might be anything illegal in her vehicle. At this point, the testimony presented by Ms. Kremen and the officer diverge. Ms. Kremen testified that the officer threatened to jail her if she did not give consent to search. The officer testified that Ms. Kremen's consent to search was entirely voluntary. Ms. Kremen also testified that she specifically objected to a search of the front compartment of her vehicle, although the officer testified that the search of the front compartment was consented to. To challenge the officer's credibility, the defense presented evidence that the officer had plead guilty to four counts of crimes involving dishonesty--illegally tagging deer--in 1992. The search of the front compartment of the vehicle yielded the marijuana and marijuana pipe which led to the possession of marijuana charge.

[¶25] In its order denying the motion to suppress, the District Court indicated that it believed the officer's

testimony over Ms. Kremen's testimony on the question of whether the officer had threatened to jail Ms. Kremen in order to extract her consent to search. The court did not proceed to examine the other circumstances of the stop and detention of Ms. Kremen to determine if, in the totality of those circumstances, her continued detention was justified and her consent to search was voluntary. Likewise, it does not appear that the trial court analyzed whether the statement authorizing the search of the vehicle should have been subject to *Miranda*[11] warnings. The court's findings on the consent issue consisted of: (1) a finding that the officer asked if he could search the "front compartment area"; (2) a conclusion that "the Defendant consented to this"; (3) a footnote rejecting Ms. Kremen's contention that her consent was not voluntary because she was threatened with jail if she did not consent; and (4) a discussion of the appropriate scope of the search.

## II. DISCUSSION

[¶26] Three issues important to determination of the validity of the search of Ms. Kremen's vehicle require that her conviction be vacated and that the evidence be suppressed, or the matter be remanded for further factfinding. Those issues are:

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**11.** *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In a footnote, the trial court declined to apply the Fifth Amendment and Article 1, section 6 analysis to Ms. Kremen's statement consenting to the search. The defense raised the voluntariness of Ms. Kremen's statement as an issue and had apparently urged that the court apply the Fifth Amendment, beyond a reasonable doubt standard for voluntariness determinations.

1. Whether Ms. Kremen was subject to an illegal seizure at the time of her consent;

2. Whether Ms. Kremen's statement should have been subject to *Miranda* warnings; and

3. Whether Ms. Kremen's consent was voluntary.

A. Seizure

[¶27] When a police officer stops a car, a seizure occurs for purposes of Fourth and Fourteenth Amendment analysis. *See Delaware v. Prouse,* 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Once the traffic stop is accomplished, the seizure of the individual continues until such time as the individual is told she is free to leave. As the United States Supreme Court has noted, "certainly few motorists would feel free to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so." *Berkemer v. McCarty*, 468 U.S. 420, 436, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Although the United States Supreme Court has held that an officer attempting to extract a consent to search after a traffic stop need not affirmatively advise an individual that they are free to leave and need not consent to a search, *see Ohio v. Robinette*, 519 U.S. at 39-40, 117 S.Ct. 417,[12] its opinion did not analyze the

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**12.** We have ruled similarly that a subject need not be advised (or aware) of their right to object to a consent search in order for the consent to be voluntary. *See State v. Fredette*, 411 A.2d 65, 69 (Me.1979); *State v. Fitzherbert*, 361 A.2d 916, 920 (Me.1976). The defendants in these cases were not viewed as being subject to a custodial interrogation when their consents to search were given. Thus, no independent duty to advise them of their rights arose from a custodial interrogation.

affects of a continuing seizure of the individual on other constitutional limitations on seizures and statements made in the course of a seizure.[13]

[¶28] Key facts in *Robinette* are close to the facts here. In both, the effort to obtain consent for a vehicle search began after the entire transaction relevant to the traffic stop had been completed. The Ohio Supreme Court had ruled that continued detention, unrelated to the original purpose of the stop, and without separate reasonable articulable suspicion, constituted an illegal seizure. *See State v. Robinette*, 73 Ohio St.3d 650, 653 N.E.2d 695, 697-98 (Ohio 1995). The United States Supreme Court did not directly address this issue. Instead, it shifted the analysis to a discussion of the

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**13.** Analyzing the *Robinette* opinion, one law review article commented, "Oddly, the Court did not address the question of whether Mr. Robinette was 'seized' when the deputy asked for consent to search. If the Court had ruled on this point, it appears that, based on early Court decisions, the consent should have been ruled invalid as a product of an illegal seizure." Visser, *Without a Warrant*, 35 HOUS. L. REV. at 1719 (Citing a plurality opinion in *Florida v. Royer*, 460 U.S. 491, 507-08, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) holding that a "consent" to search luggage by a person illegally detained was "tainted by the illegality and was ineffective to justify the search"). In its most recent Fourth Amendment case where the facts indicated consent, the Court held that an officer's physical manipulation of a bus passenger's carry-on luggage violated the Fourth Amendment's proscription against unreasonable searches. *See Bond v. United States*, --- U.S. ----, ----, 120 S. Ct. 1462, 1465, 146 L.Ed.2d 365 (2000). In *Bond* the officer obtained the suspect's consent to open the luggage after manipulating it, but the government did not assert consent as a basis for admitting the evidence. *See id.* 120 S.Ct. at 1463 n.1.

irrelevance of the subjective intent of the officer. *See Ohio v. Robinette*, 519 U.S. at 38, 117 S.Ct. 417. This may have occurred because the Ohio ruling addressed "the motivation behind a police officer's continued detention." *State v. Robinette*, 653 N.E.2d at 697.[14] There is also an important

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14. The Ohio Supreme Court opinion stated:

> When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure.
>
> . . . .
>
> Because Robinette's consent was obtained during an illegal detention, his consent is invalid unless the State proves that the consent was not the product of the illegal detention but the result of an independent act of free will. *Florida v. Royer* (1983), 460 U.S. 491, 501, 103 S.Ct. 1319, 1326, 75 L.E.2d 229, 238. The burden is on the state to prove that the consent to search was voluntarily given. *Id.* at 497, 103 S.Ct. at 1324, 75 L.Ed.2d at 236. The factors used in consideration of whether the consent is sufficiently removed from the taint of the illegal seizure include the length of time between the illegal seizure and the subsequent search, the presence of intervening circumstances, and the purpose and flagrancy of the circumstances. *United States v. Richardson* (C.A. 6, 1991), 949 F.2d 851, 858.

*State v. Robinette*, 653 N.E.2d at 697-98.

distinction in *Robinette* that the defendant was outside of the vehicles when the consent questions were asked, while here Ms. Kremen was subject to continued detention in the police car when the consent questions were asked of her.

[¶29] *Robinette* does not stand for the proposition that a valid traffic stop serves as a general warrant to detain and question on issues unrelated to the stop after the transaction based on the stop has been completed. Article 1, sections 5 and 6 of the Maine Constitutions do not permit a valid traffic stop to become authority for continued detention and questioning on other issues, once the transaction based on the stop has been completed.[15] Under the Maine Constitution a lawful detention pursuant to a traffic stop ends when the transaction based on the traffic stop is completed, unless further issues relating to personal safety or reasonable articulable suspicion of other illegal activity are generated during the course of the traffic stop transaction.

[¶30] If consent to search is given during the course of an unlawful seizure of an individual, the results of the search must be suppressed as "tainted fruit." *See Dunaway v. New York*, 442 U.S. 200, 218-19, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *see also Florida v. Bostick*, 501 U.S. 429, 433-34 (1991); *Florida v. Royer*, 460 U.S. 491, 501, 507-08, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion). In determining if a seizure has occurred, "the crucial test is

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**15.** *See e.g., State v. May*, 608 A.2d 772, 774 (Me.1992) (holding that police had no authority to search a defendant's wallet, found in a police cruiser, after the defendant had been validly arrested and released, such that the arrest transaction had ended); *see also State v. Garland*, 482 A.2d 139, 144 (Me.1984) (indicating that an officer cannot continue to press an investigation and detention of a person when the reason for the investigation and detention has evaporated).

whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that [she] was not at liberty to ignore the police presence and go about [her] business." *Florida v. Bostick*, 501 U.S. at 437, 111 S.Ct. 2382 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988)).

[¶31] The District Court made no finding as to whether Ms. Kremen was subject to an illegal detention at the time of her "consent." However, the facts surrounding Ms. Kremen's continued detention do not appear to be disputed in the record. She had been removed from her vehicle and ordered to sit in the police cruiser. She had not been told she was free to leave at the time the "consent" was extracted from her. Thus, as a matter of law, her seizure or detention continued,[16] although any justification for her seizure had ended. Accordingly, at the time her "consent" was extracted, Ms. Kremen was subject to an unlawful seizure, requiring that the results of the search be suppressed.

B. *Miranda*

[¶32] In this case, the facts suggest that when Ms. Kremen made whatever statement she made indicating that the officer could search her vehicle, she was still in custody because a reasonable person in her situation would not believe that she was free to leave. *See State v. Martin*, 580 A.2d 678, 681 (Me.1990).[17] Let us remember, Ms. Kremen was in the front seat of the police car where she had been told to sit by the officer. Also, she was under interrogation. "A

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16. *See* the discussion at ¶ 27 of this dissent.

17. *See also Berkemer v. McCarty*, 468 U.S. at 436, 104 S.Ct. 3138.

custodial interrogation occurs whenever a defendant has been taken into custody or otherwise deprived of [her] freedom by the authorities in any significant way and is subject to questioning." *State v. McLain*, 367 A.2d 213, 220 (Me. 1976).

[¶33] Unless we are, at this point, to develop an "automobile exception" to traditional *Miranda* requirements, Ms. Kremen, being both in custody and under interrogation, would have had the right, under the Fifth Amendment of the United States Constitution and Article 1, section 6 of the Maine Constitution, to be advised that she had the right to remain silent, that any statement she might make could be used against her, and that she had a right to consult with counsel prior to making any statements. *See Miranda v. Arizona*, 384 U.S. at 444, 86 S.Ct. 1602; *State v. Preston*, 411 A.2d 402, 405-06 (Me.1980). No such cautions were given here. It is undisputed that the only basis for search of the vehicle was whatever statement Ms. Kremen made regarding giving of consent. Absent that statement there was no reasonable articulable suspicion, safety concern, observation of anything in plain view, or any other basis for a warrantless search. If the search was the result of an uncautioned statement while Ms. Kremen was in custody and under interrogation, the results of the search must be suppressed. *See Miranda*, 384 U.S. at 476, 86 S.Ct. 1602; *Preston*, 411 A.2d at 405.[18]

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**18.** *See also State v. Koucoules,* 384 A.2d 860, 868 (Me. 1974) (indicating, as dictum, that a search which exceeds the bounds of a valid consent "becomes an invidious invasion of privacy rendering the search unreasonable without the meaning of the Fourth Amendment, and the fruits thereof must be suppressed").

C. Voluntariness

[¶34] Separately, the suppression court did not sufficiently analyze the issue of the voluntariness of Ms. Kremen's statement of consent. The court stated that it did not believe Ms. Kremen's statement that the officer had threatened to jail her if she did not consent to the search. But with that finding made, the court did not go on to further analyze, based on the totality of the circumstances, the issue of whether her statements to the officer were voluntary. Voluntariness of a "consent" to search must be analyzed under the Fourth Amendment and Article 1, section 5, "by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. at 39, 117 S.Ct. 417; *State v. Sherburne*, 571 A.2d 1181, 1185 (Me.1990). Relevant but not dispositive factors in determining if consent to a search is voluntary include "[k]nowledge of the right to refuse consent; presence of coercive surroundings, including the location of the request; and the number of police officers present. . . ." Visser, *Without a Warrant*, 35 HOUS. L. REV. at 1696.

[¶35] While voluntariness is not examined with the Fifth Amendment, beyond a reasonable doubt burden of proof, *see State v. Koucoules*, 343 A.2d at 872-76, the State must prove voluntariness of a consent by preponderance of the evidence. *See id.* at 866, 872-73; *see also State v. Fredette*, 411 A.2d 65, 68 (Me.1979). Accordingly, when voluntariness is challenged, the totality of the circumstances must be examined. The State must prove and the court must find that the consent was "free and voluntary and not the product of coercion, whether express or implied." *Fredette*, 411 A.2d at 68 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)).

[¶36] Here, once the court rejected the credibility of Ms. Kremen's statement that she was threatened with arrest if she did not consent, it appears to have assumed the voluntariness of the consent and proceeded to the issue of the scope of the consent, which it also resolved against Ms. Kremen.

[¶37] The totality and the circumstances in this case -- for search and seizure and self-incrimination analysis -- includes the reality that there is a common and widespread law enforcement practice of using traffic stops to attempt to extract consent searches of vehicles where, but for the consent, no other legal basis for the search exists. This practice relies on compulsion and the compromise of freedom resulting from the traffic stop and the implicit, sometimes explicit, threat of further impediment or delay to obtain a consent to search.[19] The circumstances here also include interrogation in the arguably coercive surroundings

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**19.** Finding "consent" to search voluntary in drug seizure cases requires an interesting circuity of reasoning. To convict a person of possession of the drugs found, the court must find, beyond a reasonable doubt, that she knew or was aware of her possession of the drugs. *See* 17-A M.R.S.A.§ 103-B(3) (Supp. 1999); *see also State v. Friel*, 508 A.2d 123, 128 (Me.1986), *cert. denied.* 479 U.S. 843, 107 S.Ct. 156, 93 L.Ed.2d 96; *State v. Deering*, 1998 ME 23, ¶ 12, 706 A.2d 582, 585; Alexander, *Maine July Instruction Manual*, ¶ 6-43 (Supp.2000). To find consent voluntary, the court must find that the defendant, aware of the drugs in her vehicle, consented to have it searched in the exercise of her free will and rational intellect. Thus, consent must be found despite evidence of an arguably coercive environment and a result indicating that the choice to allow the search may have been less than free or less than rational. *But see Florida v. Bostick*, 501 U.S. at 437-38 (stating that the reasonableness or rationality analysis "presupposes an innocent person").

of the police car in which Ms. Kremen had been ordered to sit. *See Preston*, 411 A.2d at 405 (observing that police "increased the coercive nature of the interrogation by conducting it in the police car"); *see also State v. Thibodeau*, 496 A.2d 635, 639-40 (Me.1985).

[¶38] A person acts voluntarily to provide testimonial self-condemnation of a crime or, here, a consent to search, only if that person chooses "freely and knowingly, to provide criminal self-condemnation by utterances from [her] own lips." *State v. Collins*, 297 A.2d 620, 626 (Me. 1972). Notably, *Koucoules*, while refusing to apply *Collins's* beyond a reasonable doubt burden of proof to the voluntariness of consent analysis, did appear to accept a similar definitional analysis of voluntariness, using terms requiring consent to be "knowledgeable" and "intelligent" and not a product of "duress" or "coercion," "express or implied." *Koucoules*, 343, A.2d at 872-76.[20]

[¶39] The consent here was obtained by using the common tactic of holding an individual after a traffic stop to utilize the pressures resulting from that continued holding to

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**20.** *Koucoules* would not appear to permit a condition not caused by influence from the authorities to compromise voluntariness of a consent for Fourth Amendment and Article 1, section 5 analysis. *Compare State v. Rees*, 2000 ME 55, 748 A.2d 976; *State v. Caouette*, 446 A.2d 1120 (Me.1982) (holding that independently arising conditions may impair voluntariness under Article 1, section 6 analysis).

Issues of the burden of proof for voluntary consent and whether voluntariness of a consent may be impaired by an independent condition have not been thoroughly examined by us since *State v. Koucoules*. Those issues need not be addressed here.

compromise an individual's freedom and their free will in order to obtain a consent. Without trial court findings on the point, it is difficult to conclude that Ms. Kremen's consent, given in the totality of those circumstances, was, by a preponderance of the evidence, a statement made as the result of the exercise of her own free will and not the product of duress or coercion, express or implied.

## III. CONCLUSION

[¶40] I would vacate the conviction and order the evidence resulting from the search suppressed because "consent" was extracted during an improper detention of Ms. Kremen. Alternatively, I would vacate the conviction and remand for factfinding on the voluntariness issue.

Law Enforcement Case No.
97-6021

Maine District Court
Docket No. 97-1350

* * *

| Date | COURT ACTION AND OTHER ORDERS |
|---|---|
| | Case called and Def. Failed to Appear |
| | ( ) Arrest Warrant to Issue. Bail _____ |
| | ( ) Lic./Rt. to Opr./Rt. to Obt. of App for Lic. Susp. |
| | ( ) M/V Reg. Susp'd |
| 10-1-97 | (X) Default Judgment on Civil Violation |
| | * * * |
| | Continuance for Trial to 1/14 8$^{30}$ |
| | * * * |
| 7-22-98 | (Trial Held) |
| | Finding/Judgment |
| J.M. | (X) Adjudicated to have committed civil violation. |
| | ( ) Not Guilty/Adjudicated not to have committed civil violation. |
| | ( ) Other _____ |
| 7-22-98 J.M. | The Court enters the following Order/Sentence |
| | Fine $ 200 |
| | * * * |
| | /s/ Ronald Russell |
| | Signature of Judge |

STATE OF MAINE

| | |
|---|---|
| SUPERIOR COURT | DISTRICT COURT Three |
| _____, ss. | Location Newport Me |
| Docket No. _____ | Docket No. 97-1350 |

STATE OF MAINE

v.

**ORDER**
**ON PAYMENT OF FINES, ETC.**
**(14 M.R.S.A. § 3141(4))**

BARBARA M. KREMEN
Defendant

Amount of fine(s): $229.00; Due today: $ _____

Installment payments: $_____ per (week)(month)
Final payment due August 26, 1998 at 1:00 (p.m.)
unless there is an appeal.

To the defendant:

The court finds that you have the ability to pay your fine(s), but is satisfied that to require payment at this date would cause you and any dependents you may have severe and undue hardship. Having considered this matter, it is ORDERED that you shall pay the clerk of the court the immediate partial payment and installment payments as set forth above.

**WARNING**

You are notified that if your fine is not paid according to the above schedule, you may be subject to contempt of court, arrest, and, if the fine is for a violation of Title 29 or 29-A M.R.S.A. (motor vehicle laws), you driver's license or permit, your right to operate a motor vehicle and your right to

apply for or obtain a driver's license may be suspended without further notice. If any fine is for a civil violation or traffic infraction and the fine is not paid within 30 days from the date it is due, costs of $25, will be added automatically. If the fine or the installment is not paid at or before the date and time due, you are ORDERED to appear in court at that date and time.

Date: 7-22-98

/s/ James MacMichael
Judge/Justice

STATE OF MAINE
PENOBSCOT, SS.

SUPERIOR COURT
Docket No. AP 98-41

State Of Maine,
Plaintiff,

v.

Barbara M. Kremen,
Defendant.

**ORDER ON APPEAL**

**FILED AND ENTERED**
**SUPERIOR COURT**
JUL 22 1999
**PENOBSCOT COUNTY**

While on her way to the Phish concert at Limestone, Maine in August of 1998, the Appellant was stopped for speeding in the town of Newport. He was given a ticket for a speeding infraction pursuant to 29-A § 83, § 103 and Rule 80F M.R.Civ.P. Ms. Kremen paid the fine for speeding and that civil case was resolved. That the officer had a reasonable, articulable suspicion based of [sic] the commission of a speeding infraction allowing a stop of Defendant's vehicle is confirmed by the Defendant's payment of the fine assessed.

The second matter that the events of August 15, 1998 generated related to a search of her motor vehicle. Ms. Kremen was not arrested; she was not "seized" because she had not committed any crime. At the request of the officer, Defendant accompanied him to the police car and after a discussion she gave the officer permission to search her car. He found marijuana and a pipe for its use. Those facts were the [sic] found by the trial court.

In State v. Cilley, 707 A.2d 79, 82 (Me. 1998) the Law Court said: "[A]n encounter between a police officer and a citizen implicates the Fourth Amendment **only** if the police officer "seizes" the citizen" (emphasis added). The Law Court went on to note that a seizure of the person occurs when " 'the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen' such that he is not free to walk away." That is the focus of the Defendant's argument. See State v. Preble, 430 A.2d 553, 555 (Me. 1981) and Knowles v. Iowa, 119 S. Ct. 484 (S.C. U.S., 1998) where the Knowles Court rejected a seizure because there was no arrest. Arrest in Iowa was an unexercised option not present in Maine. The Supreme Court of the United States concluded no seizure of personal property would be allowed.

The Defendant's argument seems based on the type of logic that pervades Justice Stevens' dissent in Florida v. White, 119 S. Ct. 1555, "[B]ecause the Fourth Amendment plainly "protects property as well as privacy" and seizures as well as searches, cit.om., I would apply to the present case our longstanding warrant presumption. In the context of property seizures by law enforcement authorities, the presumption might be overcome more easily in the absence of an accompanying privacy or liberty interest. Nevertheless, I would look to the warrant clause as a measure of reasonableness in such cases." Justice Stevens went on to suggest that his reasoning was based on the idea that "the role of a neutral magistrate was [in]dispensable because the "exceptions have all but swallowed the general rule." The Defendant here appears to recognize that the Fourth Amendment does not apply; only its principles do.

The crux of the State's case appears at page 53 and page 54 of Volume II of the transcript. The critical question is whether consent for a vehicle search was given. On page 8 of Volume II it is clear that the officer believed he had been

given permission. When he asked if Defendant objected to a search, "[S]he responded no, she had no problem with that". Vol. II, page 8, line 16. On page 11 without challenge the officer said he found marijuana and "a marijuana pipe that had been freshly packed with marijuana." Page II, line 11 et seq. As noted those statements are evidence of the facts contained in them: there was a consent for a search and there was marijuana.

The Defendant challenges the factual findings of the District Court because the District Court denied the Motion to Suppress on May 20, 1998. The Court specifically rejected the Defendant's contention that she was coerced into granting the consent. See Note 1, page 1 of the Order. As to voluntariness, it is a question of fact for the trial court and the trial court's determination must be upheld unless clearly erroneous. State v. Seaman's Club, 1997 ME 70, ¶7, 691 A.2d 1248. The trial court explicitly found that the officer's testimony was more credible than the Defendant's. That is a determination reserved to the trial court. Nevertheless, Defendant contests that finding on appeal by arguing that the officer could not be found to be credible on any objective analysis[1].

In State v. Bartlett, 661 A.2d 1107, 1108 (Me. 1995) relying on Qualey v. Fulton, 422 A.2d 773 (Me. 1980) the Law Court said: "... the trial court, as fact finder, is not required to adopt the version of the truth proffered by either party. The factfinder is permitted to draw a reasonable inference that logically flows from testimony or proved physical facts, so long as the evidence is such that it is probable and the inferred fact exists. Bradford v. Harris, 499 A.2d 159, 161 (Me. 1985) holds a factfinder is entitled to

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[1] The use of a simple, written consent form might well have obviated this issue. See Note 1 on pages 1 and 2 of the Court's Order on the Motion to Suppress.

believe some parts of witness testimony to the exclusion of others. Cit.om. It has the prerogative to selectively accept or reject testimony and to combine such testimony in any way." In Horner v. Flynn 334 A.2d 194 (Me. 1975) Justice Pomeroy speaking for the Court wrote at page 200: "Factfinding can never be a search for certainty. In civil cases the factfinder must necessarily decide issues by a balance of probabilities." Nothing suggests that the trial court here did not do just that.

It must be remembered that on appeal from a District Court judgment, factual findings are reviewed for clear error. Legal conclusions are reviewed de novo. State v. Storey, 1998 ME 161, ¶8, 713 A.2d 331; M.R.Civ.P. 76D. As noted above the State's burden of proving a civil violation is by a preponderance of the evidence. M.R.Civ.P. 80H(h). The evidence on appeal, where the State prevailed below, is viewed in the light most favorable to the prosecution, State v. Hayes, 675 A.2d 106, 109 (Me. 1996). The review is to determine if a factfinder rationally could find by a preponderance of the evidence every element of the offense charged[2]. There was sufficient evidence to allow the findings made.

Defendant argues that the Court erred in admitting opinion evidence concerning the officer's operation of a radar gun because he had taken a five-year hiatus from the police force and had not been recertified to operate a radar gun. Defendant failed to argue this point at trial; therefore, her unpreserved argument is reviewed only for obvious error. State v. Kaler, 1997 ME 219, ¶17, 691 A.2d 1226. The officer testified that he had previously been certified in radar operation, but had let his certification expire, and had received subsequent training from the Newport police

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[2] The Trial Judge corrected his error (Vol. III, page 4, lines 13-15) on page 27, line 3.

department. Defendant's argument goes to the weight to be given the officer's testimony rather than its admissibility; again, an issue for the trial court. State v. Arnheiter, 598 A.2d 1183, 1185 (Me.1991); State v. Caron, 525 A. 2d 1049, 1050 (Me. 1987). There is no basis to find the trial court committed obvious error in considering this testimony. The court's finding of voluntary consent based on what it found to be the officer's credible testimony is not clearly erroneous.

Defendant further contends that the officer's request to search the vehicle breached his duty to discontinue the brief detention of Defendant once he had dealt with the speeding violation. Although an "officer has the duty to discontinue the investigation and forego a Terry-type stop of the individual when by the time of the intended stop justification for the initial suspicion has evaporated," State v. Garland, 482 A. 2d 139, 144 (Me. 1984), the officer in this case had reasonable, articulable suspicion to stop Defendant based on her apparent speeding violation. The officer did not breach any constitutional duty by merely inquiring if he could search her vehicle. Therefore, once it was given, the officer had a right to search for substances and on discovering contraband, the right to seize it and charge the civil violation for possession of a usable amount of marijuana.

Defendant further argues that the trial court erred in declining to dismiss the charge because the seized marijuana was destroyed prior to trial. The trial court's finding that the seized substance was marijuana, based on the testimony of the officer rather than the admission of the seized substance, satisfies a preponderance-of-the-evidence standard. C.f State v. Hayes, 675 A.2d at 109 (stating that a conviction may rest entirely on circumstantial evidence).

The State's failure to preserve evidence does not violate a criminal (it must be remembered that there are **no**

criminal charges here) defendant's right to a fair trial unless: (1) the evidence possesses an exculpatory value that was apparent before the evidence was destroyed; (2) the defendant would be unable to obtain evidence of comparable value by other reasonable available means; and (3) the State acted in bad faith in failing to preserve potentially useful evidence. State v. Cyr, 588 A.2d 753, 755 n. 4 (Me. 1991); see also U.S. v. Gallant, 25 F.3d 36, 38-39 (1st Cir. 1994) (affirming conviction where no evidence that police destroyed marijuana roots in bad faith).

There is no evidence in this case that the State acted in bad faith or that the seized substance possessed an apparent exculpatory value. Nothing justifies the application of the 'governmental fair play' standard recognized in State v. Munsey 152 Me. 198, 201 127 A2d 79, 81 (1956) and State v. Hinds, 472 A.2d 422 (Me. 1984) with respect to blood samples and applicable here to the destroyed evidence. After all, Defendant presented no evidence that the substance was not marijuana or that it was not hers. When she testified, she never suggested that it was not marijuana. See Vol II, page 33 et seq. Moreover, Defendant's attorney said "[A] search ensued and marijuana was found in the vehicle. . . ." Vol I, page 4, lines 8 and 9. The officer identified the substance olfactorily [sic]: "[A]nd it had that odor. There was no doubt in my mind what it was. . . . Marijuana."

Finally, Defendant argues that she cannot be deemed to have possessed the marijuana because there was a passenger in the car with her. Maine law recognizes two kinds of possession, actual and constructive. State v. Ketchum, 1997 ME 93, ¶19, 694 A.2d 916 (Lipez, J., dissenting). Actual possession means actual physical custody of an item, and constructive possession means that "although one does not have actual physical custody of the goods, the defendant has dominion, authority or control over them." Id. (brackets omitted). The driver of a vehicle is

deemed to have control of, and be in constructive possession of, the vehicle's contents. State v. Mower, 407 A.2d 729, 733 (Me. 1979). Because Defendant was driving the vehicle, she can therefore be found to be in possession of marijuana inside the vehicle's glove compartment and center console compartment. That is especially true since she did not implicate the passenger in any way and, as noted, never denied the marijuana was hers.

There are no grounds for relief on appeal. The Order must be: APPEAL DENIED, REMANDED TO THE DISTRICT COURT FOR ENTRY OF FINAL JUDGMENT.

**The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R.Civ.P Rule 79 (a).**

Dated: July 22, 1999

/s/
FRANCIS C. MARSANO
JUSTICE, SUPERIOR COURT

STATE OF MAINE
PENOBSCOT, SS.

DISTRICT COURT
Located at Newport
Criminal Action
Docket No. 97-1350

STATE OF MAINE, )
)
)
v. ) **ORDER ON MOTION**
) **TO SUPPRESS**
)
BARBARA KREMEN, )
Defendant. )

Hearing on the Defendant's Motion to Suppress was held on April 22, 1998. The Defendant appeared with counsel. The parties filed post-hearing memoranda.

Shortly after noon on August 15, 1997, Officer Boucher made a traffic stop of a vehicle operated by the Defendant. The stop was based on an apparent speeding violation. As the court indicated orally at hearing, this stop was proper.

After some initial conversation between Boucher and the Defendant, the officer asked her to accompany him to the police cruiser, and she did so. During the ensuing conversation, the Defendant advised Boucher that she was driving to a rock concert in Aroostook County. While they were in the cruiser, Boucher asked her if there was "anything illegal" in the vehicle. The Defendant responded in the negative. Boucher then asked the Defendant if he could search the "front compartment area" of the vehicle. The Defendant consented to this.[1] Boucher then returned to the

[1] The court rejects the Defendant's contention that the consent was not voluntary. She testified that Boucher

Defendant's vehicle, asked the passenger to exit the vehicle, and then conducted a search. As part of the search, Boucher opened the glove compartment and found a plastic baggie of what appeared to be marijuana. He then examined other areas, including the space under the seats and the interior of a center console compartment. In the console, he found a pipe also containing what appeared to be marijuana. He evidently found nothing under the seats. The Defendant did not consent specifically to a search of the glove compartment or the console.

In determining the validity of the search, consideration must be given to whether the scope of the consent given by the Defendant included the glove compartment. There was no other basis for Boucher to conduct the initial vehicle search.[2] The State bears the burden of proving by a

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threatened, in effect, to incarcerate her if she did not consent to the vehicle search. The officer's denials of such a threat are more credible than this suggestion. His memory of the stop appears to be superior to the Defendant's, as she acknowledged that she could not fully remember all aspects of the incident. For example, she testified that, as best she can recall, she signed a written consent to the search. Boucher denied that any such instrument exists. If it did exist, it most likely would support the State's position that the consent was voluntary because it would represent another manner in which the Defendant agreed to allow Boucher access to the vehicle. The State would thus have an interest in, first, acknowledging the existence of such a document and, second, offering it into evidence. Neither of these things happened. From this, the court concludes that there was no written consent, and this further weakens the strength of the Defendant's testimony.

[2] In other words, the absence of consent would have left Boucher without a constitutional basis to search the

preponderance of the evidence[3] that the search was lawful, *State v. Barlow*, 320 A.2d 895, 901 (Me. 1974). Because a lawful search is one conducted within the confines of the consent, *see State v. Lewis*, 611 A.2d 69, 70 (Me. 1992), the State must prove that the officer did not exceed the scope of consent given voluntarily by an authorized person who has an expectation of privacy in the premises.

The test to determine the scope of consent "is that of 'objective' reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251, 114 L.Ed.2d 297, 302 (1991).[4] Put more precisely, the question is whether the State has proven by a

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vehicle. However, once Boucher discovered the apparent marijuana in the glove compartment, he then had probable cause to search the remainder of the vehicle.

[3] The Defendant appears to argue that State is required to prove a valid consent (including, among other things, that it was voluntary) beyond a reasonable doubt. As her own case support shows, however, this standard of proof applies only to questions of the voluntariness of statements for fifth amendment purposes.

[4] In *Jimeno*, the United States Supreme Court concluded that consent to search "the car," 500 U.S. at 249, 114 L.Ed2d at 302, encompassed consent to search a closed paper bag found on the floorboard. Here, the Defendant consented to a search of the "front compartment area," rather than "the car." The scope of the consent at issue here is clearly more limited than that involved in *Jimeno*.

preponderance that, when viewed objectively, the Defendant's consent to a search of the "front compartment area" can reasonably be construed to include a search of the glove compartment. While the phrase "front compartment area" lacks a certain amount of precision, the court is ultimately satisfied that, when viewed objectively, this physical description can reasonably be seen to include the glove compartment. A glove compartment is an integral part of the passenger area, where documents and small personal effects can be stored. It clearly is within the "area" of the front compartment, where the operator and any passengers are situated.[5] The search was therefore proper.

Although not addressed specifically by the parties, the search of the console (which the court takes to be a closeable storage area in the passenger area of the vehicle) was also proper. First, it was within the scope of the Defendant's consent, when that consent is construed objectively. As with the glove compartment, a console is an area used specifically for storage of small items and which is accessible to people present in the interior of the vehicle. Second, having already searched the glove compartment, Bouchard had discovered a baggie of what he believed to be marijuana. With this initial discovery, he had probable cause to search the remainder of

---

[5] This case is distinguishable from *Lewis*, where the defendant consented to the search of one bag which, in fact, contained another bag. The search of the interior bag was found to exceed the scope of the consent relating to the larger bag. *But see Jimeno*, 500 U.S. at 251, 114 L.Ed.2d at 302-03 (consent to search a car includes consent to search a container located inside that car). Here, the glove compartment is a part of the "front compartment area." Thus, consent to search the latter created consent to search the former.

the passenger compartment for more contraband. Therefore, Bouchard's search of the console, resulting in the discovery of apparent drug paraphanalia [sic], did not violate the Defendant's fourth amendment interests.

The docket entry shall be:

For the reasons set out in the order dated May 20, 1998, the Defendant's Motion to Suppress is denied.

Dated: May 20, 1998

/s/ Jeffrey L. Hjelm
Judge, Maine District Court

FILED & ENTERED
JUN - 5 1998
Newport District Court

**SUPREME COURT OF THE UNITED STATES**
**OFFICE OF THE CLERK**
**WASHINGTON, D.C. 20543-0001**

**WILLIAM K. SUTER**
**CLERK OF THE COURT**

**AREACODE 202**
**479-3011**

September 7, 2000

Mr. Wesley MacNeil Oliver
6329 Freret Street
Room 255-D
New Orleans, LA 70118

Re: Barbara M. Kremen
v. Maine
Application No. 00A207

Dear Mr. Oliver:

The application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case has been presented to Justice Souter, who on September 7, 2000, extended the time to and including November 18, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By
/s/ Gail B. Johnson
Assistant Clerk

## UNITED STATES CONSTITUTION
## AMENDMENT IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## UNITED STATES CONSTITUTION
## AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATE OF MAINE
PENOBSCOT COUNTY, SS.

DISTRICT COURT
DISTRICT III
DIVISION OF WESTERN
PENOBSCOT

Docket No. 97-1350

STATE OF MAINE

v.

BARBARA KREMEN

(VOLUME II)

BEFORE:

The Honorable Jeffrey L. Hjelm, Judge of the District Court, in Newport, Maine, on Wednesday, April 22, 1998.

APPEARANCES:

Gregory A. Campbell, Esq.
For the State

Gary M. Prolman, Esq.
For the Defendant

* * *

[page 5]

PIERRE BOUCHER, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS, DIRECT EXAMINATION BY MR. CAMPBELL

Q Would you state your name, please?

A Pierre Boucher.

Q How are you employed, Mr. Boucher?

A I work full time presently for the Somerset County Sheriff's Department, and for a short period of time I was working for the Newport Police Department as a part-time patrolman.

* * *

Q Directing your attention to August 15th of 1997, were you working at approximately twelve fifteen on that date?

A Yes, sir, I was.

[Page 6]

Q And would this be in the early afternoon–

A Yes.

Q –or the early morning?

A What was the time again, sir?

Q Twelve fifteen.

A That was correct. That would be the early afternoon.

Q Okay. And do you remember what you were doing that afternoon at approximately twelve fifteen?

A I was traveling in a westly direction on Elm Street.

Q Were you in uniform and in a marked police cruiser?

A Yes, sir, I was.

Q Was the cruiser equipped with radar?

A Yes, sir, it was.

Q Are you certified to run radar?

A Yes. My certification–I've been certified. It had expired, but I am familiar with radar and have been checked off on it.

Q And did you get a radar readout on a vehicle that caught your attention?

A Yes, sir, I did.

Q And what was the speed on the vehicle?

A I believe I first picked it up in–at forty-six or forty-seven. I think ultimately I locked it in at forty-eight. And this is a--this was in a 25 zone.

Q And did you stop the vehicle because of the speeding?

A Yes, sir, I did.

Q Did you approach the vehicle?

A Yes, sir, I did.

Q Is the driver of the vehicle in court?

A Yes, sir. Yes, sir, she is.

Q Would you point her out, please?

A Be Mrs. Kremen, the lady with the yellow sweater at the defendant's table.

Q And when you went up to the vehicle, did you tell her why you stopped her?

A Yes, sir, I did.

Q And what did you do at that point?

A I advised her why I pulled her over and that I was gonna be issuing her a summons, and asked her to come back and have a seat in the cruiser with me.

Q While you did the ticket for speeding?

A Yes.

* * *

Q What happened when she got back to the police cruiser?

A I asked her where she was going and–you know, I believe she had–she was coming up from New Hampshire. Just general talk. And I asked her if there was anything illegal in the vehicle, any weapons, contraband. I believe that's what the extent of it was.

Q And what did she say?

A She responded no, that there was nothing that she was aware of illegal in the vehicle.

Q Now, where was she seated in your police car?

A In the front seat.

Q Did you have any further conversation with her?

A I simply asked her if she had a problem if I searched the compartment area of the vehicle.

Q What did she say?

A She responded no, she had no problem with that.

Q Describe the tone of the conversation.

A Very friendly. Relaxed, I suppose. Nothing–not overbearing by any means.

Q How long had you been talking to her before you asked her this question about searching?

A From the time the initial stop was made until I asked her--there was probably a four-minute time period--by the time of the approach and then back in the car.

Q How long had she been in the cruiser?

[Page 9]

A A couple of minutes.

Q What happened after she replied that she didn't mind?

A I advised her that I was gonna exit my cruiser and search the com–front compartment area of the vehicle, and I did that.

Q Did you go back up to her vehicle?

A Yes, I did. I went up to the passenger side.

Q And was there another person in the vehicle?

A Yes, sir, there was.

Q And where was this person sitting?

A In the front passenger seat.

Q Did you have a conversation with this person?

A Yes, I did.

Q Tell us about that.

A A brief conversation. He opened the door and I explained to him that I had received consent from the--the operator to search the vehicle and asked him the same question, if he was familiar with--or whether or not there'd be any illegal weapons or contraband in the vehicle.

Q What did he say?

A His response was, "Well, there may be something in the trunk."

Q What happened from that point?

A He, I believe, grabbed the keys out of the ignition. We walked back to the trunk. He opened the trunk and he [Page 10] pulled out a–he showed me large knife--hunting knife. I--

Q What happened after saw that?

A I told him that that was not an issue, that would not be a problem.

Q Okay. What did you do after you had this conversation regarding the knife with the passenger?

A I went back to the front compartment area of the vehicle and opened up the glove box.

Q What did you find, if anything?

A Baggie of marijuana.

Q Where was that in the glove box?

A Right--when you open--it was right in plain sight after you open the glove box.

Q Did you recognize the substance in the baggie?

A Yes, sir, I did.

Q Were you able to see into the baggie?

A Yes, sir, I was.

* * *

[Page 11]

Q You seized the item?

A Yes, sir, I did.

Q Why?

A Because it was illegal?

Q What was it?

A Marijuana.

Q Did you look further in the vehicle?

A Yes, sir, I did.

Q And where did you look? What did you do?

A From there I–'cause I just briefly looked under the seats. There was a center console between the passenger and driver's seat, and I opened that up.

And in that area I located a marijuana pipe that had been freshly packed with marijuana.

Q And did you seize that as well?

A Yes, sir, I did.

Q How long did this search of the vehicle take?

A At that point probably I hadn't--the total stop was still, I'm sure, under ten minutes.

Q How about the searching?

[Page 12]

A After I found the pipe, I contacted the other patrolman that was on duty, and he responded to the scene, and we did a further search of the vehicle. And the total time period was probably twenty min--twenty-five minutes. We didn't locate anything further.

Q At any time did either the defendant or the passenger say or do anything to indicate that they objected to the search of the vehicle?

A No, not at all. They were very–fully cooperative.

MR. CAMPBELL: That's all. Thank you.

* * *

CROSS EXAMINATION BY MR. PROLMAN

MR. CAMPBELL: Excuse me. I'll stipulate that there was no probable cause to search up until the time of the discovery of the marijuana, if you want to do that.

COURT: It's up to you folks. If you want to stipulate to that, fine.

MR. CAMPBELL: If it'll save time.

MR. PROLMAN: Well,--

COURT: If you want to pursue the evidence itself, you're certainly free to do that.

MR. PROLMAN: I think it's very relevant just to–

COURT: That's fine. You don't have to explain.

MR. PROLMAN: Okay.

COURT: That's fine. You don't have to explain.

MR. PROLMAN: Okay.

COURT: If you don't want to enjoin the stipulation, you don't have to.

MR. PROLMAN: Okay.

CROSS EXAMINATION CONTINUED BY MR. PROLMAN

Q The defendant, while driving her vehicle, was not crossing any–the centerline, is that correct?

A No, sir, she was not.

Q And the defendant was not crossing over the outside lines?

A No, sir.

[Page 16]

Q And the defendant was not weaving within her own lane, is that correct?

A That is correct. No.

Q And there were no other notations that I saw in the police report that demonstrated any erratic operation of the vehicle?

A No, sir, that is correct.

Q When you put your light on, the defendant didn't take an inordinate amount of time to pull her vehicle over, is that correct?

A No, sir.

Q And when she pulled it over, she parked properly on the road, is that correct?

A That is correct.

Q And when you approached the vehicle, the defendant did not have a problem producing her license, registration and proof of insurance, is that correct?

A No, she did not.

Q And the defendant, when asked to exit her vehicle, had no problem exiting her vehicle, is that correct?

A That is correct.

Q Now, you said that you had some lengthy discussions with her–well, over four–four or five minutes that were–you were very close to her, is that–is that correct? I mean you were in the front seat of your car at one point?

[Page 17]

A Yes, sir.

Q And at another point you–the initial point was right when she was in the driver's seat I'm assuming, and – and you were outside and you asked her to step out of the vehicle?

A Yes, sir.

Q There's nothing in your police report that indicates that the defendant had glassy eyes, is that correct?

A That's correct.

Q And there's nothing in your police report that indicates that the defendant had flushed face?

A That's correct.

Q And there's nothing in your police report that you smelled any odor of marijuana?

A That's correct.

Q Okay. And there's nothing in your police report that indicates there was any smell of marijuana coming from the vehicle whatsoever?

A That's correct.

Q And when you looked–and I may be characterizing this wrong, but you can correct me. When you looked inside the vehicle, as you're looking down asking the defendant for her license, registration, proof of insurance, there's nothing in your police report that indicates that there was any signs of marijuana, is that correct?

[Page 18]

A That is correct.

Q So that would include–or–or paraphernalia I guess?

A That's correct.

Q So that would include no seeds on the floor. That would include no--

A That's everything, sir.

Q --rolling papers.

A There's nothing.

Q And you had also asked her if she had any weapons, and she indicated that there were no weapons?

A That was–that was in the front seat of the cruiser when I had asked her that question. Yes, sir.

Q Okay. And there was nothing visible to your eye?

A Nothing visible, no.

Q The defendant never indicated to you that she had anything illegal in the car, is that correct?

A No, she did not.

* * *

Supreme Court, U.S.
FILED
DEC 21 2000
OFFICE OF THE CLERK

(2)

No. 00-822

IN THE
SUPREME COURT OF THE UNITED STATES

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BARBARA M. KREMEN,
*Petitioner,*

v.

STATE OF MAINE,
*Respondent.*

---

On Petition For Writ of Certiorari to the
Supreme Judicial Court of Maine

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# BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

---

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December 21, 2000

291P

## QUESTIONS PRESENTED FOR REVIEW

1. Whether an officer may, during the course of a seizure for a traffic offense, question the detained motorist about crimes which are unrelated to the traffic stop and which he has no articulable basis to suspect.

2. Whether an officer may, during the course of a seizure for a traffic offense, request the detained motorist to consent to a search of her automobile where the officer has no basis to suspect any wrongdoing beyond the traffic infraction.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

## STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have appeared as counsel before the Court in significant civil liberties cases, *e.g.*, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998), and *Good News Club v. Milford Central School*, Sup. Ct. No. 99-2036 (October 2000 Term), and have filed *amicus curiae* briefs in numerous Fourth Amendment cases, including *Wyoming v. Houghton*, 526 U.S. 295 (1999), *Illinois v. Wardlow*, 120 S.Ct. 673 (2000), *Florida v. J.L.*, 120 S.Ct. 1375 (2000), *Indianapolis v. Edmond*, 121 S.Ct. 447 (2000) and *Ferguson v. City of Charleston*, S.Ct. No. 99-0936 (oral argument October 4, 2000). Institute attorneys currently handle several hundred civil rights cases nationally, including numerous Fourth Amendment cases. The Institute has published educational materials and taught continuing legal education classes in this area as well.

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[1] *Amicus curiae* The Rutherford Institute files this brief by consent of counsel for both parties. Copies of the letters of consent are on file with the Clerk of the Court. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

The Rutherford Institute supports the Petitioner's request for a writ of certiorari because it regards the case as an opportunity for the Court to clarify vital issues of Fourth Amendment jurisprudence that remain extant. The Institute recognizes that government at all levels, as well as the public as a whole, has a vital interest in the eradication of illegal activity, and particularly activity which threatens highway safety such as drug abuse. *New York v. Class*, 475 U.S. 106, 112 (1986) (citing *Delaware v. Prouse*, 440 U.S. 648, 658 (1979)). Nevertheless, the Court has a corresponding duty to resist the "hydraulic pressures" that the interests of effective law enforcement exert upon the rights of citizens, and to ensure that in seeking to further this interest, police officials continue to respect the constitutional limits of their authority. *Terry v. Ohio*, 392 U.S. 1, 60-61 (1968) (Douglas, J., dissenting). *Cf. Indianapolis v. Edmond*, 121 S. Ct. 447 (2000) (suspicionless traffic roadblocks for detecting drug activity held violative of the Fourth Amendment).

## ARGUMENT

### I. CERTIORARI IS APPROPRIATE IN THIS CASE BECAUSE APPELLATE COURTS HAVE ENUNCIATED CONFLICTING STANDARDS FOR THE PERMISSIBLE SCOPE OF A VALID TRAFFIC STOP IN THE WAKE OF *OHIO V. ROBINETTE*, 519 U.S. 33 (1996).

The Petitioner seeks clarification of a constitutional issue that has caused both the federal Circuit Courts of appeals and state appellate courts to irreconcilably diverge:[2] whether, in the course

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[2] *See* Petition for Writ of Certiorari at 9-10 (citing court decisions in the majority) and 12 (minority decisions).

of a valid traffic seizure, when a reasonable motorist would not have felt "free to leave," *United States v. Mendenhall*, 446 U.S. 544, 553 (1980); *Terry*, 392 U.S. at 19, n.16, the investigating officer may seek to expand the scope of the purpose for the traffic seizure or its duration by requesting consent to search the vehicle. *Amicus* respectfully submits that the deep division on this issue among the courts is a result of the lack of clarification as to the meaning of the Court's limitation of an investigative stop conducted pursuant to *Terry v. Ohio*, *supra*, in "scope to the justification for [its] initation." *Terry*, 392 U.S. at 20; *see State v. Kremen*, 754 A.2d 964, 967 (Me. 2000) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975)). This issue was left open to interpretation following the Court's decision in *Ohio v. Robinette*, 519 U.S. 33 (1996). *See id.* at 46 (Stevens, J., dissenting) (noting that case raised two questions not decided by the Court, whether Robinette "was still being detained when the [officer questioned him], and, if so, whether that detention was unlawful"). Recently, in a similar context, in *Indianapolis v. Edmond*, the Court expressed no view on an analogous question, "whether police may expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car." 121 S.Ct. at ___, *slip op.* at 27 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (a search must be "'reasonably related in scope to the circumstances which justified the interference in the first place'" (quoting *Terry*, 392 U.S. at 20)). This case presents the Court with an opportunity to clarify whether an attempt to broaden the "scope" of a traffic seizure, whether in purpose or duration, absent reasonable suspicion of criminal activity, contravenes the rationale of *Terry* as it has been applied to automobile searches and seizures.

A. The Minority View, As Represented by the

Opinion Below, Permits Investigating Officers to Seek Expansion of the Scope of a Traffic Seizure Absent Any Cognizable Government Interest in Doing So.

This Court has held that a traffic stop constitutes a seizure for Fourth Amendment purposes, even where "the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). A traffic stop is initiated and sustained by means of an official show of force, under coercive circumstances. *See generally* George M. Dery III, *"When Will this Traffic Stop End?": The United States Supreme Court's Dodge of Every Detained Motorist's Central Concern – Ohio v. Robinette,* 25 Fla. State U. L.Rev. 519, 555 (1998) ("The very fact of a pre-existing seizure enhanced the police domination of the situation, and, therefore, increased the potency of all the other factors pointing toward the restriction of [a motorist's] liberty."). "Stopping or diverting an automobile in transit... is materially more intrusive than a question put to a passing pedestrian...." *United States v. Mendenhall*, 446 U.S. at 556-57 (opinion of Stewart, J., concurring). Even a routine traffic seizure interrupts the "freedom of movement" of the motorist and his passengers, is annoying and time-consuming, and frequently generates "substantial anxiety," even for an innocent, law-abiding motorist. *Prouse*, 440 U.S. at 657.

Because a traffic stop is accomplished by a show of authority, which authority is not dissipated unless and until, at a minimum, the subject's papers are returned and the driver is informed whether a decision to issue a citation has been made, *Florida v. Royer*, 460 U.S. 491 (1983), a motorist will ordinarily accede to official requests posed during a stop, including a request to search his

vehicle. *Cf. Berkemer v. McCarty*, 468 U.S. 420, 436 (1984) ("Certainly few motorists would feel free to either disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so."); *see also* H. Richard Uviller, TEMPERED ZEAL 16 (1988) ("In virtually every encounter I have witnessed, the response of the person [to a police officer's approach] was docile, compliant, and respectful."). In fact, the mere request to search in the context of a traffic stop may create a presumption that the seizure continues. *Robinette*, 519 U.S. at 47 (Stevens, J., dissenting); *id.* at n. 4, citing 4 W. LaFave, SEARCH AND SEIZURE § 9.3(a), p. 112 (3d ed. 1996 and Supp. 1997) ("Given the fact that [defendant] quite clearly had been seized when his car was pulled over, the return of the credentials hardly manifests a change in status when it was immediately followed by interrogation concerning other criminal activity.").

The minority view, permitting use of a traffic stop to gain consent to search absent reasonable suspicion of criminality, flouts the central rule of *Terry* stop jurisprudence, that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967)); *United States v. Brignoni-Ponce*, 422 U.S. 873; *United States v. Mendenhall*, 446 U.S. 554; *Florida v. Royer*, 460 U.S. at 500 ("The scope of the detention must be carefully tailored to its underlying justification."). "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." *Terry*, 392 U.S. at 28. The investigative methods employed pursuant to a *Terry* stop "should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500. In reviewing police conduct in this area, the burden is upon

the state to demonstrate the reasonableness of the duration *and* scope of the search in relation to its legitimate purpose. *Id.*

It is clear that an investigatory seizure may not exceed in duration of time required to reasonably dispel the suspicion that validated its initiation. For example, the Court held in *Florida v. Royer* that an investigation that was permissible at its inception became an impermissible seizure by virtue of its extended duration and the coercive effect of taking the subject's airline tickets away, recovering his luggage and questioning him in a small, bare room. 460 U.S. at 502. *Royer* thus stands for the proposition that a restriction on a subject's ability to depart from the area within a reasonable period of time prevents the search from being reasonably limited in scope to the purposes which justified it. Similarly, in *Dunaway v. New York*, an hour-long detention of the defendant was held to be "in important respects indistinguishable from a traditional arrest," since the defendant was never informed that he was "free to go," and would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. 442 U.S. 200, 212 (1979). *Cf. United States v. Place*, 462 U.S. 696, 699 (1983) (seizure of an air passenger's baggage for the purpose of conducting a canine sniff excessive, where bags were held for ninety minutes).

The restrictive view enunciated by a bare majority of circuits, *see* Petition at 9, which interprets the permissible "scope" of an investigative traffic stop as intending the purpose of police questioning as well as its duration, is consistent with general Fourth Amendment safeguards laid down by the Court in other contexts. A search incident to a lawful arrest must be limited in scope to that which is justified by the purposes served by that exception to the warrant requirement. *Florida v.Royer* , 460 U.S. 498. Likewise,

the "hot pursuit" exception to the warrant requirement permits the warrant requirement to be abandoned in the context of probable cause to arrest a fleeing suspect, but not reasonable suspicion to interrogate. *Johnson v. United States*, 333 U.S. 10 (1948). *Cf. Arizona v. Hicks*, 480 U.S. 321 (1987) (actions of police officer in executing an otherwise lawful "exigent circumstances" search of an apartment for evidence relating to shooting incident, by moving a stereo turntable to read its serial number to ascertain whether it was stolen, "produce[d] a new invasion of [the defendant's] privacy unjustified by the exigent circumstances that validated the entry"). Even a search for weapons under *Terry* and its progeny "must be strictly circumscribed by the exigencies which justify its initation," and cannot be used to pursue a search for other evidence of criminal activity. *Adams v. Williams*, 407 U.S. 143, 146 (1972); *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979); *Sibron v. New York*, 392 U.S. 40, 65 (1968). As the Court explained in *Minnesota v. Dickerson*, 508 U.S. 366 (1993):

> [T]his Court rightly "has been sensitive to the danger... that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will." Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to "the sole justification of the search [under Terry:] ...the protection of the police officer and others nearby." It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize and that we have condemned in subsequent cases.

508 U.S. at 378 (citations omitted).

A reading of the permissible scope of a traffic seizure to restrict inquiry to the facts material to the purpose of the stop is reasonable in view of the fact that where no reasonable suspicion of criminality exists, authorities lack a legitimate government interest in searching the subject's vehicle. The Court has stated that "in the absence of any basis for suspecting [the defendant] of misconduct, the balance between the public interest and [defendant's] right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas*, 443 U.S. 47, 52 (1979). Police questioning of motorists regarding matters unrelated the reasons for the stop "has nothing to do with serving the purpose of the traffic stop." *Charity v. Maryland*, 132 Md. App. 598, 753 A.2d 556, 569 (2000). The interrogation is designed to elicit inconsistencies or anomalies in the answers of the driver and his or her passengers that may provide grounds to search the vehicle. *Charity*, 753 A.2d at 569; *see* Peter Verniero & Paul H. Zoubek, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING, N.J. Att'y Gen. Rep. at 17 (April 20, 1999) ("The officer may ask a series of polite questions of the driver and/or the occupant(s), inquiring as to where they are traveling from and as to their final destination. The officer in asking these 'routine' questions will be looking for discrepancies or anomalies that suggest that the occupants are lying, which might, in turn, suggest ongoing criminal activity.")[3]

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[3] The New Jersey Attorney General's report, after an extensive survey of the practice of racial profiling, which concluded that most consent searches conducted by state troopers on the New Jersey turnpike did not result in the discovery of criminal evidence. N.J. ATT'Y GEN. REP., *supra*, at 26. This finding was in spite of the fact that New Jersey does not permit officers to request consent to search a vehicle in the absence of reasonable suspicion of criminal

In view of the lack of any countervailing government interest in searching where no particularized suspicion exists, the better reasoned rule would appear to be a restriction on the permissible scope of questioning. For example, in *United States v. Pruitt*, 174 F.3d 1215 (11th Cir. 1999), the court held that police questions after the processing of a motorist's documentation such as "What do you do for a living?" and "How much money did your van cost?" were held simply irrelevant as a "fishing expedition," and hence violative of the *Terry* rationale. 174 F.3d at 1221. *See also United States v. Holt*, 229 F.3d 931 (10th 2000); *Almond v. State*, 530 S.E.2d 750, 752 (Ga. Ct. App. 2000) (if an officer, lacking reasonable suspicion, "proceeds to ask questions unrelated to the reason for the stop, the officer goes beyond the permissible scope of the investigation, and the further detention of the car driver exceeds that permitted by *Terry v. Ohio* and its progeny"); *State of Kansas v. Mitchell*, 960 P.2d 200, 265 Kan. 238 (Kan. 1998) (after motorists provides license and proof of registration, he must be allowed to proceed; "to justify a temporary detention for questioning, the officer must also have reasonable suspicion of illegal transactions in drugs or any other serious crime"). Nor does *Berkemer v. McCarty*, *supra*, suggest a different rule, since in *Berkemer*, the investigating officer had more than ample articulable facts upon which to ground a reasonable suspicion that the subject motorist was operating under the influence of alcohol or drugs. 468 U.S. at 423 (vehicle observed weaving in and out of a lane, driver failed field sobriety test).

B. Permitting Investigating Officers to Seek to Expand

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activity. *Id.* The report likewise concluded that "most arrests are for less serious offenses, and 'major' seizures of significant drug shipments are correspondingly rare." *Id.* at 33.

the Scope of a Traffic Seizure by Requesting Consent to Search from a Detained Motorist Provides Law Enforcement Authorities With a Standardless, Intrusive Investigational Tool.

The traffic stop in *Delaware v. Prouse*, a discretionary, suspicionless stop for a spot check of license and registration, was ruled unconstitutional "primarily on account of [the officer's] exercise of 'standardless and unconstrained discretion.'" *Edmond*, 121 S.Ct. at ___, *slip op.* at 13-14. *Cf. Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (traffic checkpoints for drivers under the influence of alcohol constitutionally permitted where standard procedures were in place). "[S]tandardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Prouse*, 440 U.S. at 661 (citations omitted). Permitting searches in the absence of a reasonable suspicion that a driver is hiding contraband contravenes the Court's chief concern in *Terry* and its progeny that invasive police actions be predicated upon more than mere hunch. "The demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry*, 392 U.S. at 21, n. 18. Individualized suspicion is "necessary to ensure that police discretion is sufficiently constrained." *Whren v. United States*, 517 U.S. 806, 817-18 (1996). As the Court observed in *United States v. Martinez-Fuerte*:

> In *Brignoni-Ponce,* [the Court]... concluded there that random roving-patrol stops could not be tolerated because they "would subject the residents of... [border] areas to potentially unlimited interference with their use of the

> highways, solely at the discretion of Border Patrol officers.... There also was a grave danger that such unreviewable discretion would be abused by some officers in the field.

428 U.S. 543, 558-59 (1976), citing *Brignoni-Ponce*, 422 U.S. at 882-83.

The facts adduced at the suppression hearing in Petitioner's case are illustrative of the clear propensity of "consent" searches in traffic seizures to be borne of subtly coercive circumstances. The responding officer testified that while patrolling in uniform in his marked police cruiser, he stopped Petitioner for traveling in excess of the speed limit. Petition Appendix at 44a - 45a. (Testimony of Pierre Boucher). He promptly notified her that he would be issuing her a summons for the violation. Pet. Appx. at 45a. He ordered her to exit the vehicle, a permissible tactic in traffic seizures in the interests of officer safety. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). He directed her to sit in the police cruiser cruiser with him while he issued the citation. Pet. Appx. at 45a. Once in the cruiser, Ms. Kremen, a young woman just out of high school, was made to remain seated in the front seat of the patrol vehicle while the officer made out the citation. Pet. Appx. at 46a. It was while making out the citation, and after Ms. Kremen denied that she that anything illegal in the car, that the officer nonetheless requested consent to search the vehicle. *Id.*

As the Court was to subsequently clarify in *Knowles v. Iowa*, 525 U.S. 113 (1999), the mere citation Officer Boucher gave Ms. Kremen did not provide a constitutional basis for searching her vehicle. However, if the officer had been able to articulate facts to establish that Ms. Kremen had shown nervousness, hostility, or

furtive behavior as opposed to pleasant cooperation, the officer may then have contended he had "reasonable suspicion" on which to base a search for weapons. *Michigan v. Long*, 463 U.S. 1032 (1982). *United States v. Walden*, 146 F.3d 487, 491 (7th Cir. 1998) (questioning of motorist unrelated to broken tail light which justified the stop was held permissible because officer reasonably feared for his safety). *Cf. Illinois v. Wardlow*, 120 S.Ct. 673 (2000); *Sibron v. New York*, 392 U.S. at 66-67 ("[D]eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*."). The circumstances presented by Petitioner's case and similar cases aptly illustrate the Hobson's choice facing drivers who are asked to "consent" to a search while undeniably within the context of a traffic seizure. An investigating officer can have it both ways; if the motorist cooperates agreeably and accedes to the request for a search, she has "consented." If she fails to cooperate or shows the stress and anxiety commonly associated with a traffic stop, *see Delaware v. Prouse*, *supra*, she may find herself under "reasonable suspicion" for illegal activity and her car may be searched for weapons. Ultimately, if police are given free reign to request "consent" to search in inherently coercive environments, vehicle searches may become the norm, rather than the exception. The grave implications of such a regime are explored below.

## II. REVIEW OF THE QUESTIONS PRESENTED IN PETITIONER'S CASE IS PARTICULARLY URGENT IN LIGHT OF THE FACT THAT AUTHORITY TO PERFORM "CONSENT" SEARCHES DURING ROUTINE TRAFFIC SEIZURES HAS BEEN SHOWN TO BE SUBJECT TO ABUSE.

As the Court's *amicus* discusses above, to vest discretion to

seek an extension in the scope of a traffic seizure absent reasonable suspicion is to provide police with an investigative tool that is inherently subject to abuse. Inevitably, the burden imposed by allowing "consent" searches during traffic seizures could be expected to fall disproportionately upon minority citizens. This is borne out by real-world experiences of minorities subject to such searches:[4]

> Officers will occasionally find drugs while performing traffic stops, but more often they will not discover illegal narcotics. What this means in the real world of traffic stops is that motorists receive different treatment depending upon their skin color. If an officer does not expect to discover drugs when a white motorist is stopped for speeding, the officer is less likely to find them, which means that a white motorist will not be subjected to tactics designed to discover narcotics during a traffic stop.

Tracey Maclin, *The Fourth Amendment on the Freeway*, Rutgers Race & the Law Rev., Vol. 3, No. 2 (2001) (no page citation available).

In its seminal study of racial targeting in highway searches, the Attorney General of New Jersey found that minority motorists were disproportionately targeted for consent searches:

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[4] As Justice Stevens has noted, "We have previously considered, and rejected, [an] ivory tower analysis of the real world for it fails to describe the experience of many residents, particularly if they are members of a minority." *California v. Hodari*, 499 U.S. 621, 630, n.4 (1991) (dissenting).

> The data presented to us show that minority motorists were disproportionately subject to consent searches .... We have concluded, based upon our preliminary review of the allegation and information developed in a number of internal affairs investigations, as well as anecdotal accounts from interviews with state troopers, that race and ethnicity may have influenced the exercise of discretion by some officers during the course of some stops.

N.J. ATT'Y GEN. REP., *supra* at 28. Further, as Professor Maclin observes, the commonly held notion that minorities are disproportionately represented among those arrested and convicted for narcotics offenses tends to become a self-fulfilling prophecy. Maclin, *supra*. He cites the New Jersey Attorney General's report, which observed:

> The fact that the arrest rates for whites was comparatively low does not mean that white motorists are less likely to be transporting drugs, but rather that they were less likely to be suspected of being drug traffickers in the first place and, thus, less likely to be subjected to probing investigative tactics designed to confirm suspicions of criminal activity such as, notably, being asked to consent to a search.

N.J. ATT'Y GEN. REP., *supra* at 32. The Attorney General's conclusion was based upon data suggesting that the notion that minority motorists are more likely to be transporting drugs is not necessarily empirically supportable.[5] Further, a study of Maryland

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[5] The New Jersey data demonstrated that 10.5% of the searches involving white motorists resulted in an arrest or seizure of contraband, while 13.5% of searches involving African-American

state troopers suggested that the rate of drug recoveries did not substantially vary between African-American motorists and white motorists. Tracey Maclin, *Race and the Fourth Amendment*, 51 Vanderbilt L.Rev. 333, 351 (1988) (explaining that a plaintiffs' expert in a civil rights case brought against the Maryland State Police found that troopers recovered contraband from 28.4% of African-American motorists searched and from 28.8% of white motorists searched).

Where length of detention is extended by the giving of "consent," but no contraband is discovered, the impact on minority motorists may remain hidden and largely unredressable. *See* David A. Harris, *The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters,* 84 Minn. L.Rev. 265 (1999); N.J. ATT. GEN. REP., supra, at 15 ("Arrest statistics, by definition, do not show the number of persons who were detained or investigated who, as it turned out, were not found to be trafficking drugs or carrying weapons."). The *Terry* Court urged a restrictive use of investigative stops in light of the understanding of the potential impact on innocent citizens:

> [I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

392 U.S. at 16-17. The Court went on to measure the nature and

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motorists and 38.1% of searches involving Hispanic motorists resulted in an arrest or seizure. N.J. ATT'Y GEN. REP., *supra*, at 26.

quality of the intrusion against police interest in imposing it, noting, "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." 392 U.S. at 24-25. Searches of personal effects in automobiles are no different in emotional impact. *See* Harris, *supra*; J. Wilgoren, "Public Profiling Debate: Acting on Experience, or on Bias," *The New York Times*, April 9, 1999 (describing experience of African-American motorists whose vehicles were searched pursuant to a "racial profile").

While is certainly true that "the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct," *Terry*, 392 U.S. at 12 (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), it is equally true that "[r]egardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." 392 U.S. at 14. Such is the case where police conduct "consent" searches in the absence of articulable suspicion of illegal activity in the mere hope of pursuing a "hunch," or even of "practicing" investigative tactics at the expense of an innocent motorist. *See, e.g.*, *Ohio v. Retherford*, 639 N.E.2d 498, 505 (Ohio Ct. App. 1994) (officer declared in testimony, "all" of the cars he stopped for traffic violations would be searched, "[m]ore so for any other reason the fact that I need the practice").

In such a regime, police harassment may well take the place of proper investigation as the principle means of crime control. The

dangers of this regime are obvious:

> The right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.... There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

*Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).[6]

The social costs of such a regime are substantial. The *Terry* Court recognized these costs, and cautioned:

> Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these

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[6] One example of such a case is *Brown v. Texas* 443 U.S. 47 (1979) in which the defendant was observed in a high-crime area, stopped and patted down absent reasonable suspicion that he was armed or engaged in criminal activity. 443 U.S. 47. Ordinarily, the individual would have gone on his way, intimidated and humiliated but unable to obtain redress because the actions of the officer were not susceptible to proof that they were "shocking to the conscience" as amounting to a "deliberate indifference to" or "reckless disregard for" the subject's personal liberty. *Sacramento v. Lewis*, 523 U.S. 833 (1998). It was only because he was arrested and charged for refusing to provide his name that his case came to light, a practice the Court held violative of his right to decline to cooperate. 443 U.S. at 53.

> limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.

392 U.S. at 14-15. Recent research indicates that the "wholesale harassment" by police of minority groups has intensified in recent years. *See generally* David Cole, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (New Press, 1999) (noting that a recent poll found that nearly 90 percent of African-Americans in New York thought the police force often engaged in brutality against minorities and two-thirds said such brutality was widespread).

Numerous commentators have urged that race not play any routine role in investigative decisionmaking, for the burden of enduring intrusive police tactics almost inevitably falls upon the minority members of the community. *See, e.g.*, Randall Kennedy, RACE, CRIME, AND THE LAW 162 (1977) ("Everyone – ordinary citizens, legislators, police officials, judges, and so on – should demand that race play no routine role in decision-making regarding whom to scrutinize for purposes of law enforcement."); Cole, *supra*, at 50. Professor Cole explains, "Even where race is not an explicit factor, it will often be an unstated one, and toleration of loose, race-neutral profiles will therefore have the effect of tolerating race-based stops." *Id.* at 50-51.

In applying the strictures of the Fourth Amendment to traffic seizures, this Court has made it clear that race may not be the primary factor upon which the decision to stop or search is based. *See United States v. Brignoni-Ponce*, 422 U.S. at 885-86

(disapproving practice of stopping vehicles away from the border based solely on the apparent Mexican ancestry of occupants). Nonetheless, the approach taken by a plurality of courts after *Ohio v. Robinette*, allowing officers in their own discretion to seek to extend the scope and duration of stops by requesting "consent" to search from stopped motorists, has been shown to consistently burden minorities to a greater degree than non-minorities. In view of this, *amicus* respectfully submits that Petitioner's appeal offers an opportunity to consider whether it is appropriate in the context of this issue to exercise the diligence the Court has warned is necessary to ensure that the "very large category of presumably innocent" citizens who wish not to speak with police officers are not nonetheless subject to "virtually random seizures." *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (a variety of circumstances which fell under the "drug courier profile" held insufficient to permit a stop because they encompassed a very large category of innocent travelers).

## CONCLUSION

It is true that the "often competitive enterprise of ferreting out crime" requires that police have the authority to thoroughly investigate criminal activity and to disarm dangerous citizens. *Terry*, 392 U.S. at 12, quoting *Johnson v. United States*, 333 U.S. at 14. Nonetheless, it is equally true that the Supreme Court has "repeatedly decided that [the Fourth Amendment] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." *Gouled v. United States*, 255 U.S. 303, 304 (1921). "A ruling admitting evidence in a criminal trial ... has the necessary effect of *legitimizing the*

*conduct which produced the evidence*, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry*, 392 U.S. at 13 (emphasis supplied). The Court's *amicus* suggests that Petitioner's appeal is an exceptional opportunity, presented on a clear record, to review and clarify for the courts, police and the public whether an officer may seek to extend the scope and duration of a traffic seizure by requesting consent to search the vehicle without offending the Fourth Amendment.

Respectfully Submitted,

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December 21, 2000